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No. 07-

IN THE
Supreme Court of the United States

EXXON MOBIL CORPORATION,
Petitioner,

v.

JOSEPH GREFER ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Although a jury held ExxonMobil liable for purely economic harm to a $1.5 million piece of industrial property, it awarded $1 billion in punitive damages based entirely on the threat of physical harm to nonparties. The Court of Appeal reduced that punitive damages award to $112 million. This Court granted ExxonMobil's petition for a writ of certiorari, vacated the Court of Appeal's judgment, and remanded the case for reconsideration in light of *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). The Court of Appeal "st[oo]d by its initial decree." The questions presented are as follows:

1. Whether the Court of Appeal on remand denied due process when it continued to punish ExxonMobil for harm to nonparties, left intact a punitive damages award without finding that ExxonMobil's conduct was reprehensible as it affected plaintiffs, and held that the jury could "consider the harm suffered by both parties and non-parties regardless of the type or similarity of harm suffered."

2. Whether, contrary to the decisions of other federal and state appellate courts, a court may remedy a concededly tainted punitive damages trial by affirming the maximum punitive damages award due process permits, rather than by ordering a new trial.

3. Whether due process permits punitive damages twice the amount of compensatory damages in a case of economic injury when compensatory damages are $56 million and plaintiffs' actual harm is no greater than $1.5 million.

PARTIES TO THE PROCEEDING

Petitioner is Exxon Mobil Corporation, one of two defendants-appellants below. Intracoastal Tubular Services, Inc. was the other defendant-appellant below and is a respondent under this Court's Rule 12.6. Other parties named as defendants in the trial court – none of whom were parties on appeal – were Alpha Technical Services, Inc.; Chevron, U.S.A., Inc.; Conoco, Inc.; Homeco Inc.; HuntPetroleum Corp.; Hassie Hunt Exploration Co.; Mobil Exploration & Producing Southeast, Inc.; Phillips Oil Co.; Sexton Oil & Mineral Corp.; Shell Offshore, Inc.; Shell Oil Co.; Shell Western E&P, Inc.; System Fuels, Inc.; Texaco, Inc.; Tubular Corp; OFS, Inc.; and Oilfield Testers, Inc.

Plaintiffs-appellees below, Joseph Grefer, Camille Grefer, Rose Marie Grefer Hassi, and Henry Grefer, are respondents under this Court's Rule 12.6.

RULE 29.6 DISCLOSURE

Exxon Mobil Corporation has no parent corporation and no person or entity owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Exxon Mobil Corporation ("ExxonMobil") respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Court of Appeal, Fourth Circuit, in this case.

OPINIONS BELOW

The opinion of the Court of Appeal on remand is reported at 965 So. 2d 511 and is reprinted in the Appendix to the Petition ("App.") at 1a-35a. The first opinion of the Louisiana Court of Appeal is reported at 901 So. 2d 1117 and is reprinted at 36a-107a. The final judgment of the trial court is unreported and is reprinted at App. 62a-66a.

JURISDICTION

The Court of Appeal issued its opinion on August 8, 2007. App. 3a. The Louisiana Supreme Court denied ExxonMobil's timely petition for certiorari review on November 16, 2007. Justices Kimball and Victory would have granted the application. *Id.* at 123a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

In *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), this Court held that "the Constitution's Due Process Clause forbids a State to use a punitive

damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, . . . those who are, essentially, strangers to the litigation." *Id.* at 1063. This Court granted certiorari in this case, vacated the judgment affirming a $112 million award of punitive damages, and directed the Court of Appeal to reconsider its decision in light of *Williams*. App. 122a.

In response to this mandate, the Court of Appeal reprinted a large section of its original opinion and insisted that it had anticipated *Williams*, despite having affirmed jury instructions that predicated punitive damages on a claimed risk to public health, *see* App. 9a-12a, and having rejected arguments that ExxonMobil could not be punished solely for the potential harm its conduct allegedly posed to nonparty employees, *id.* at 114a. The Court of Appeal determined that ExxonMobil had acted reprehensibly based solely upon the physical harm allegedly suffered by nonparties to the litigation and held that the jury could "consider the harm suffered by both parties and non-parties regardless of the type or similarity of harm suffered as a result of defendant's conduct." App. 33a. The court's clear disregard of this Court's precedents and its order to reconsider in light of *Williams* warrants review.

In addition, the decision below exacerbates a split among federal and state appellate courts as to whether a court may remedy a concededly tainted punitive damages trial by affirming the maximum substantive punitive damages award the Constitution permits rather than by granting a new trial. Although the Court of Appeal recognized that the trial court erred in "allow[ing] the plaintiffs to argue

and present substantial evidence . . . of the potential and/or alleged actual harm" to the public, the court refused to grant ExxonMobil's request for a new trial. App. 26a. Instead, the court reduced the punitive damages to the maximum award it believed constitutionally available as a matter of due process. That error provides this Court the opportunity to take up the unfinished business of *Williams* and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and resolve a split among federal and state courts as to whether, when an award of punitive damages rests upon improper considerations, due process permits a court to remedy that error by awarding the maximum amount of damages due process permits.

The decision below also exacerbates a divide in the lower courts over the amount of punitive damages that may constitutionally be awarded where compensatory damages are already substantial. The court here awarded $112 million in punitive damages on top of the $56 million plaintiffs received to compensate for and remediate the damage to their $1.5 million piece of property. That award was unconstitutional under this Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which teaches that due process does not permit the award of any punitive damages when compensatory damages are sufficient to punish and deter and that the highest permissible ratio in a case of substantial compensatory damages is 1:1.

A. Factual Background

1. Plaintiffs jointly own a 33-acre tract of industrial property in Harvey, Louisiana. *See* App. 46a &

n.8. That tract of land is worth at most $1.5 million. *Id.* at 4a, 46a, 66a.

For decades, plaintiffs leased their land to ITCO, an oil and gas service company. App. 41a. ITCO's services included the storage, handling, transportation, inspection, cleaning, and threading of drill pipes used in oil production. *Id.* Several oil companies, including ExxonMobil, routinely sent their pipes to ITCO for cleaning. *Id.* As part of cleaning the pipes, ITCO sometimes removed built-up "scale" from inside some of the pipes. *Id.* at 36a. Scale is caused by mineral salts, which precipitate as oil and gas flow through pipes from underground reservoirs to the surface. *Id.* at 48a-49a. Some of the scale involved here contained radium sulfate, and over several decades, the pipe cleaning activities led to the accumulation of naturally occurring radioactive material ("NORM") on plaintiffs' property. *See* App. 36a.

2. Although ExxonMobil and other oil companies sent pipes to ITCO for cleaning beginning in the early 1950s, it was not until 1986 that ExxonMobil learned that some of the scale in the pipes contained low levels of NORM. App. 43a-44a. After investigating that discovery, ExxonMobil prepared a videotape and a letter advising pipe-cleaning contractors about the presence of NORM in its pipes and the risks associated with it. Within nine months of the discovery, ExxonMobil notified ITCO and stopped shipping pipes to it for cleaning. *Id.* at 44a. ITCO continued to store contaminated pipes on the property until 1992, when it ceased all operations on plaintiffs' land. *Id.* at 4a, 24a, 46a.

B. Proceedings Below

1. In August 1997, plaintiffs sued ExxonMobil, other oil companies, other pipe-cleaning companies, and ITCO itself, claiming that their property had been damaged as a result of the cleaning and storage of pipes on the property. App. 47a-49a. Plaintiffs asserted claims for negligence, strict liability, absolute liability, nuisance, fraud, and breach of contract. *Id.* at 49a.

Plaintiffs did not assert any personal injury claims or seek any medical monitoring relief, as they do not live near or make personal use of the property. Rather, plaintiffs sought damages for loss of use and remediation of the property and punitive damages. App. 49a. Only the claims against ExxonMobil and ITCO went to trial.

2. During a five-week trial in April and May of 2001, plaintiffs urged the jury to award massive punitive damages against ExxonMobil, based *not* on harm to plaintiffs' property, but instead on the risks of physical harm allegedly posed to nonparties, including ITCO employees and the public.

This campaign to punish ExxonMobil for potential physical injury to nonparties pervaded the trial. In his opening statement, plaintiffs' counsel described NORM as "a very, very, very fine powder" that will "blow all over the place," R.32:17,[1] "travel towards the houses," R.33:19, and infiltrate churches and schools, R.33:200; R.34:38. Plaintiffs showed the

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[1] Citations to the trial court transcript are to the record filed with the Court of Appeal and take the form "R.[volume]:[page]."

jury a video of schoolchildren getting on and off a bus near their property, implying that the children had been exposed to harmful levels of radiation. R.33:191-99. Plaintiffs suggested that radium from plaintiffs' property would enter the "food chain," R.29:131, and would cause cancer and birth defects, R.29:137-41; R.32:131-36. Plaintiffs compared the conduct in this case to the *Exxon Valdez* oil spill and urged the jury to bring ExxonMobil "to an altar" again. R.56:43. In closing, plaintiffs argued that ExxonMobil left ITCO employees and the public "unprotected" by failing to tell them about risks posed by NORM. R.56:42.

Although this evidence had *nothing* to do with the economic losses alleged by plaintiffs, they claimed it showed that NORM "threatened" ITCO employees and the public and thereby asked the jury to award massive punitive damages against ExxonMobil. R.33:193; *see also* R.29:108-09 (stating that the evidence went to "the quantum of punitive damages"). ExxonMobil repeatedly objected to this inflammatory and irrelevant evidence. The trial court overruled those objections. *See, e.g.*, R.29:114, 138-41; R.33:200; R.34:38.

3. Again over ExxonMobil's objection, the trial court instructed the jury that it could award punitive damages against ExxonMobil if the company was "wanton or reckless in [its] disregard for public safety," meaning that ExxonMobil knew that it was "highly probable that harm to the public would result from [its] conduct." App. 10a. The court refused to instruct the jury, as ExxonMobil requested, that it "[could] only award exemplary damages" if ExxonMobil had engaged in wanton and reckless conduct

that damaged the plaintiffs. *See id.* at 9a-11a (quoting Exxon's proposed instructions). Instead, the trial court described harm to the plaintiffs as "[a]nother factor" the jury could consider in determining the amount of the award. *Id.* at 11a.

4. During deliberations, the jury foreperson "sent a note to the trial court inquiring as to whether any of the punitive damage award would go to compensate people in the community." App. 99a n.26. Although the court responded that the entire punitive damages award would go to plaintiffs, the jury awarded $1 billion in punitive damages against ExxonMobil.[2] App. 5a. The jury also awarded $56 million in remediation costs, which plaintiffs are not required to expend on their $1.5 million property, and $145,000 in general damages. *Id.* The trial court entered judgment against ExxonMobil for a staggering total of $1.056 billion, plus interest and costs.

5. ExxonMobil appealed. On March 31, 2005, the Fourth Circuit Court of Appeal affirmed the trial court's judgment. It rejected ExxonMobil's state-law arguments that would have reduced the compensatory damages award. *See* App. 52a-75a.

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[2] That massive punitive damages award was returned despite the fact that Article 2315.3 of the Louisiana Civil Code, the state law authorizing punitive damages, did not exist until September 1984, almost 30 years after ITCO started cleaning pipes for ExxonMobil, and was repealed in April 1996, one and one-half years before this lawsuit was filed. Because ExxonMobil stopped shipping pipes to ITCO by March 1987, App. 18a, the statute was only in effect for less than three years out of the decades of conduct at issue in this case.

In reviewing the constitutionality of the punitive damages verdict, the Court of Appeal purported to follow *BMW*, 517 U.S. 559, and *State Farm*, 538 U.S. 408. The court determined that ExxonMobil's conduct was reprehensible, not based on the "strictly economic harm" suffered by plaintiffs, but based on ExxonMobil's "nine-month delay in notifying *ITCO* . . . of the dangers posed from handling NORM contaminated equipment." App. 94a (emphasis added). The Court of Appeal described ITCO, a co-defendant in the original action, as "the target of the conduct," and found that ExxonMobil's conduct "involve[d] an element of deceit" because the company withheld from ITCO information regarding the dangers of NORM. *Id.* at 96a.

The Court of Appeal "[n]ext . . . consider[ed] . . . the disparity between" the amount of punitive damages awarded and plaintiffs' actual harm. App. 96a. At this point, the court recognized that the jury's deliberations had been tainted by plaintiffs' repeated references to alleged health risks to the public:

> Although the plaintiffs claimed only property damage, and no physical harm, the trial court allowed the plaintiffs to argue and present substantial evidence, over Exxon's objections, of the potential and/or alleged actual harm to other persons who were not parties to this suit and whose claims were not before the jury.

App. 98a. The court recognized that such evidence "was irrelevant and, more than likely, confused the jury, contributing to its exorbitant punitive damage award," which was "neither reasonable nor propor-

tionate to the amount of harm to the plaintiffs and to the general damages recovered." *Id.* at 99a-100a.[3]

Nevertheless, the Court of Appeal refused to order a new trial to remedy that error. Instead, and in the face of an admittedly "substantial" compensatory award, App. 98a, the court "reduce[d]" the jury's award to "twice the general damage award," which the court decided was the "highest figure" that could be awarded consistent with due process. *Id.* at 98a, 115a. The Court thus affirmed a punitive damages award of $112 million dollars – 75 times the value of the plaintiffs' property and twice the $56 million in compensatory damages. App. 115a.

6. ExxonMobil petitioned for rehearing, arguing that the court erred in affirming the award of punitive damages because "harm to third parties cannot be punished." Pet. Reh'g, *Grefer v. Alpha Technical*, No. 2002-CA-1237 8. The Court of Appeals rejected this argument as "an incorrect and exceedingly narrow reading of" this Court's decision in *State Farm*. App. 109a.

7. After unsuccessfully seeking review in the Louisiana Supreme Court, ExxonMobil petitioned this Court for a writ of certiorari. The Court granted the writ, vacated the judgment, and remanded for reconsideration of *Williams*, 127 S. Ct. 1057. App. 117a. The Court of Appeal instead "st[oo]d by" the obvious errors in its initial decree. *Id.* at 33a. First, the court concluded that the trial court "set forth a correct statement of the law" when, over ExxonMo-

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[3] The court did not reconcile this holding with its reliance on the harm to ITCO employees as a justification for the punitive damages verdict. *See* App. 94a-96a, 99a.

bil's objection, it instructed the jury that it could award punitive damages for alleged risks to public health and safety. App. 10a, 12a. Next, the court reprinted approximately 7 pages of its original decision that focused on the harm to ITCO employees, claimed that its original decision "t[ook] into account all of the objections and concerns raised by Exxon . . . in light of [*Williams*]," and insisted that potential harm to nonparties could be considered regardless whether plaintiffs suffered the same kind of harm. App. 32a; *see id.* at 31a-33a. The court refused to order a new trial to remedy the introduction of the admittedly irrelevant evidence of alleged harm to the public. App. 27a. And the court again affirmed the $112 million punitive damages award. *Id.* at 35a.

REASONS FOR GRANTING THE PETITION

The jury awarded $1 billion in punitive damages based not on plaintiffs' solely economic injury but on the potential physical harm ExxonMobil's conduct allegedly posed to numerous individuals not before the court – qualitatively different harms against which ExxonMobil had no way to defend. The Court of Appeal compounded that error by affirming $112 million in punitive damages despite acknowledging the unfairness of the proceedings. This petition raises three important issues warranting review:

First, this case offers the Court the opportunity to confirm, for those courts that have been unwilling to listen, that the Court meant what it said in *Williams*: Due process does not allow a jury to punish a defendant for harm or potential harm that its conduct has allegedly imposed upon nonparties to the litigation. This case also gives the Court the oppor-

tunity to eliminate any doubt that a nonparty's dissimilar harm may not be the basis for finding that a defendant's conduct toward the plaintiffs was reprehensible and deserving of punishment.

Second, even if the Court of Appeal otherwise applied the Court's punitive damages precedents correctly, this case offers the Court the opportunity to consider whether due process permits a reviewing court to remedy a faulty instruction or jury's improper consideration of evidence of nonparty harm with a reduction of the punitive damages award to the maximum amount the Constitution permits, rather than a new trial. There is a clear split in authority in the lower courts regarding whether such a reduction is a permissible remedy when the reviewing court cannot determine what portion of the award has been tainted by improper considerations. This Court granted review of that question in *BMW*, 517 U.S. 559, but did not resolve it there or in *Williams*, *see* 127 S. Ct. at 1065. This case presents an ideal vehicle for resolving the conflict.

Third, this case also provides a vehicle for the Court to consider the maximum punitive damages award (if any) that is permissible where compensatory damages are undeniably "substantial." *State Farm* holds that, in cases of "substantial" compensatory damages, punitive damages in an amount "equal to compensatory damages" may be the maximum permissible under the Constitution. 538 U.S. at 425. This case provides a striking example of the confusion in the lower courts over when that 1:1 ratio of punitive to compensatory damages is required. This Court should grant the petition to provide additional guidance on that issue.

I. THE JUDGMENT BELOW DEFIES THIS COURT'S PRECEDENT BY AWARDING PUNITIVE DAMAGES FOR HARM TO NONPARTIES.

Plaintiffs sued ExxonMobil solely to recover the costs of property damage. They did not allege or prove that ExxonMobil exposed them to physical harm. And they did not seek personal injury damages or medical monitoring. But the trial nevertheless became a referendum on whether ExxonMobil should be punished for the alleged risk of *health* problems it may have imposed on individuals "not before the court." *Williams*, 127 S. Ct. at 1060. The Court of Appeal held that the trial comported with *Williams*. App. 13a. The Court of Appeal is wrong.

As this Court explained in *Williams*, "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, . . . strangers to the litigation." 127 S. Ct. at 1063. The Court could not have been clearer that the "*potential* harm" caused by the defendant's conduct is relevant only to the extent "that the potential harm at issue [i]s harm potentially caused *the plaintiff*." *Id.* (emphasis in original). This is because "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Williams*, 127 S. Ct. at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56 (1972)). A "defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against th[at] charge," such as by

offering specific evidence to demonstrate that the nonparty victim was not injured. *Id.*

Accordingly, the Court in *Williams* stressed that "it is constitutionally important for a court to provide assurance . . . . that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 1064. States must "avoid procedure that unnecessarily deprives juries of proper legal guidance," *id.*, and offer "protection" where there is a "significant [risk]" that the jury might "seek to punish the defendant for having caused injury to others," *id.* at 1065 (emphasis omitted).

The risk of improper punishment here was overwhelming. Plaintiffs urged, and the jury returned, a punitive damages award of $1 billion based on everything *except* economic harm to plaintiffs' property. "From their opening statements onward" and continuing "throughout the litigation," *State Farm*, 538 U.S. at 420-21, plaintiffs urged the jury to award punishment based on the threat of harm NORM allegedly posed to the community at large, as well as risks allegedly posed to employees of ITCO and other pipe-cleaning contractors.

The trial court did nothing to guard against the obvious fact that the jury might punish ExxonMobil for that nonparty harm. On the contrary, the court invited the jury to impose punishment for "probable . . . harm to the public." App. 10a. That turns *Williams* on its head, "add[ing] a near standardless dimension to the punitive damages equation" that left "the jury . . . to speculate" as to harm ExxonMobil's conduct may have caused an unknown number of

persons. *Williams*, 127 S. Ct. at 1063. ExxonMobil objected to the court's instruction, just as it had objected to the evidence of alleged harm to nonparties that the instruction invited the jury to consider. But the trial court admitted the evidence and instructed the jury over ExxonMobil's objections.

The Court of Appeal recognized that the trial court erred in allowing the jury to consider "irrelevant" and "confus[ing]" evidence "of the potential and/or alleged actual harm to [nonparties]." App. 26a. But the court did not go far enough. Instead, it insisted that "Exxon should be punished for its reprehensible conduct" toward ITCO employees. App. 32a; *see* 21a-24a (identifying as "reprehensible" only conduct that purportedly harmed ITCO employees).[4]

Where the Court of Appeals erred – and erred badly – was in refusing to acknowledge that punishing ExxonMobil for alleged harm to an ITCO employee is no different from punishing ExxonMobil for harm to a neighbor. If anything, it is worse: After all, nonparties to this case had already then filed their own class action lawsuits against ExxonMobil, purporting to represent thousands of putative class

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[4] Although plaintiffs and the court relied on ExxonMobil's nine-month delay in announcing the presence of NORM to ITCO, the NORM was not a threat to plaintiffs' health or safety, and the decades of NORM deposited on the property already required, before 1986, whatever remediation was ultimately necessary. Given the "potential for causing mass hysteria in the community if the disclosure [of NORM] was made in less than a careful manner," App. 104a, any decision to allow minimal additional contamination while ExxonMobil determined the proper way to alert ITCO can in no way be deemed reckless, much less reprehensible, toward plaintiffs.

members, including pipe-cleaning employees, affected by the pipes on the plaintiffs' property. See, e.g., In re Harvey TERM Litigation, No. 01-8708 (La. Dist. Ct. Parish of Orleans, Div. D). The award thus makes concrete the risk of duplicative punishment the Court guarded against in *State Farm*, 538 U.S. at 423, and *Williams*, 127 S. Ct. at 1064-1065. Whereas ExxonMobil will be able "to defend itself against the [employees'] charge[s]" in the separate suits by establishing that its actions did not harm workers, it had no such opportunity in plaintiffs' case. See *Williams*, 127 S. Ct. at 1063.[5]

Thus, although *Williams* requires a "court to provide assurance that the jury will ask the right question, not the wrong one," 127 S. Ct. at 1064, the Court of Appeal affirmed instructions that awarded damages on the basis of "public . . . risk." App. 10a. And although *Williams* limited the relevant "potential harm" to "harm potentially caused *the plaintiff*,"

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[5] Although the Court of Appeal attempted to justify its focus on the harm to ITCO employees as "done simply to show reprehensibility," App. 32a, and not to provide a basis for punishment, that claim is belied by the court's own analysis. *See* App. 109a (rejecting as an "incorrect and exceedingly narrow reading" of *State Farm* ExxonMobil's arguments that its conduct toward ITCO employees could not serve as the basis for a punitive damages award); *id.* at 24a (following this Court's instruction to determine if "the harm" for which the defendant is being punished "was the result of . . . deceit," *State Farm*, 538 U.S. at 419, by determining that the "danger" posed to the ITCO workers involved "an element of deceit"); *id.* at 22a (describing ITCO as the "target" of the punishable misconduct, *see State Farm* 538 U.S. at 419); *id.* at 24a (deeming reprehensible Exxon's failure to warn of the "direct danger to the physical health and safety of [ITCO] workers" — a warning completely unrelated to plaintiffs' harm).

127 S. Ct. at 1063 (initial emphasis omitted), the Court of Appeal instead focused on the reprehensibility of ExxonMobil's actions toward, and harm done to, the ITCO employees. The Court of Appeal in all respects failed to "take[] into account . . . the objections and concerns raised by Exxon . . . in light of [*Williams*]," either in its original opinion or on remand. *Id.* at 32a.[6]

Indeed, the constitutional violation in this case runs far deeper than in *Williams*, where the claimed harm to nonparties at least mirrored, and therefore "ha[d] a nexus to[,] the specific harm suffered by the plaintiff." *State Farm*, 538 U.S. at 422. Here, by

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[6] Unfortunately, the Court of Appeal it is not alone in its wholesale refusal to follow *Williams* – although it is the most obvious. *See, e.g., State ex rel. Chemtall Inc. v. Madden*, 655 S.E.2d 161, 2007 WL 4098937 (W. Va. Nov. 15, 2007) (affirming decision to try and award punitive damages for a class before the class was defined or certified); id. at *7 (Benjamin, J., dissenting in part) (explaining that a court that determines punitive damages before it selects its plaintiffs clearly contravenes *Williams*' mandate, as it prevents the defendant "from presenting every available defense" against the charges against it); *Williams v. Philip Morris*, No. CC 9705-03957; CA A106791; SC S051805, 2008 WL 256614 (Or. Jan. 31, 2008) (refusing, on remand, to offer the "protection" against the "significant [risk]" that the jury might "seek[] to punish the defendant for having caused injury to others" because, "even assuming that [defendant's proposed limiting instruction] . . . clearly and correctly articulated the standard required by due process," the instruction "contained other parts that did not state the [state] law correctly"). These errors are indefensible and inexplicable under *Williams*, and this case provides the Court with the perfect opportunity to grant certiorari and make clear that the lower courts may not ignore its precedent at will.

contrast, there is a complete disconnect between the plaintiffs' solely economic harm and the potential physical injuries allegedly caused to ITCO employees and the public.

In *State Farm*, this Court held that, "to have relevance in the calculation of punitive damages," evidence of a defendant's conduct toward nonparties "need not be identical," 538 U.S. at 423, but it "must be closely related." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004). This case presents the Court the opportunity to hold that the same is true in the context of nonparty harm: Where a defendant's conduct cannot be judged reprehensible by virtue of harm it caused or potentially caused any party to the litigation, due process does not permit a plaintiff to predicate his bid for punishment solely upon dissimilar harm that may befall strangers to the litigation.

As noted above, the Court made clear in *Williams* that the "potential harm" that may be considered for purposes of determining the reasonableness of a punitive damages award is "harm potentially caused the plaintiff" because "a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge." 127 S. Ct. at 1063. A defendant faces that unconstitutional deprivation of process when confronted with an allegation that its conduct was reprehensible – "the most important indicium of the reasonableness of a punitive damages award," *BMW*, 517 U.S. at 575 – because of dissimilar harm to a nonparty. The decision to permit a plaintiff to argue reprehensibility for harms he did not suffer forces the defendant to anticipate and defend against a universe of injuries

when it has only been "charged" with one. *Cf. United Food & Commercial Workers Local 100A v. John Hofmeister & Son, Inc.*, 950 F.2d 1340, 1344-1345 (7th Cir. 1991). By the same token, allowing a plaintiff to rely upon potential, dissimilar harm that he has not suffered also makes intolerably likely the "possibility of multiple punitive damages awards for the same conduct." *State Farm*, 538 U.S. at 423.

Unlike most cases, therefore, the Court in this case may decide whether any punitive damages are constitutionally available because the allegedly reprehensible conduct purportedly harmed nonparties in a qualitatively distinct way from plaintiffs' claimed injuries. Because plaintiffs failed to demonstrate, and the Court of Appeal never found, that ExxonMobil's conduct toward them was in any way reprehensible, this Court should grant certiorari and hold that the court erred in awarding any punitive damages whatsoever.[7]

II. THE LOUISIANA COURT OF APPEAL'S DECISION TO REDUCE THE PUNITIVE DAMAGES AWARD RATHER THAN ORDER A NEW TRIAL DEEPENS A CONFLICT AMONG THE LOWER COURTS.

In the alternative, even assuming that the Court of Appeals properly applied *State Farm* and *Williams* and was warranted in awarding punitive damages, this Court should grant the petition for certiorari to resolve another critical issue: whether a reviewing court may cure a procedural infirmity,

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[7] Given the Court of Appeal's manifest failure to apply *Williams*, the Court may wish to consider summary reversal.

such as a jury's consideration of improper evidence, by reducing a jury's punitive damages award to the maximum amount allowed by due process rather than by granting a new trial. The question presented by this case was accepted for review, but not ultimately addressed, by this Court in *BMW*.[8] 517 U.S. at 586. And the issue has arisen repeatedly since the Court's decision in that case, provoking a conflict among the lower courts that was neither addressed nor resolved by *Williams*, where the Court stated that application of the correct standard on remand "may lead to the need for a new trial, or a change in the level of the punitive damages award," but did not clarify under what circumstances a new trial would be necessary. 127 S. Ct. 1065.

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[8] BMW asked this Court to address "[w]hether the Alabama Supreme Court, having found that the jury's $4,000,000 punitive damages verdict unconstitutionally punished petitioner for hundreds of transactions that occurred entirely outside of Alabama, was obligated to provide a meaningful remedy for that constitutional violation." Pet. for a Writ of Certiorari at i, *BMW v. N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (No. 94-896), 1994 WL 16011916 (Nov. 17, 1994) (first question presented). The Court granted review on that question, 513 U.S. 1125 (1995), and BMW argued that the Court could provide a "meaningful remedy" for the constitutional violation in one of two ways: It could either order a new trial on punitive damages, or it could order a remittitur that removed all of the extraterritorial punishment, the amount of which was clear from the precise way in which the jury had calculated punitive damages. Petr's Br. 23-26, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (No. 94-896), 1995 WL 126508 (Mar. 23, 1995). The Court left the "appropriate remedy" for the constitutional error to "be addressed by the state court in the first instance," *BMW*, 517 U.S. at 586, thereby leaving for that court the issue of remedy in that particular case.

A. There Is A Conflict In The Lower Courts Over The Proper Remedy When A Punitive Damages Award Is Tainted By Improper Evidence Or Instructional Error.

The decision below exacerbates a conflict in the lower courts concerning the appropriate remedy in situations where, as here, a procedural violation tainted the fairness of the trial proceedings.

1. A number of courts, both before and after *Williams*, have held that a reviewing court must order a new trial when a jury's award of punitive damages is based either on improper evidence or instructions. For example, in *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002) ("*White II*") the Ninth Circuit held that merely reducing a punitive damages award to the maximum amount permitted by due process could not cure the constitutional error in that case (allowing the jury to award punitive damages based on extra-territorial conduct) because the appellate court could not know what amount of damages the jury would have awarded if limited to constitutional bounds:

> Possibly the jury would have chosen as large an award had it been told to vindicate only the rights of Nevadans, but possibly it would have chosen a substantially lower award. For all we know, the jury would have applied a much lower ratio than the thirty to one the [district] court chose, or the sixty-six to one that the jury initially chose.

Id. at 1016.

The court of appeals ordered the same remedy when it reconsidered *White* after *Williams*. Again,

the court "conclude[d] that a new trial on punitive damages [wa]s the proper remedy" for a district court's failure to instruct the jury correctly. *White v. Ford Motor Co.*, 500 F.3d 963 (9th Cir. 2007); *see Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1017-18 (9th Cir. 2007) (vacating punitive damages verdict for *Williams* violation and remanding for new trial; noting that it could use "remittitur [to] remedy a jury award deemed unconstitutionally excessive," but deciding against that approach "where the constitutional error stems from misguidance regarding the way the jury may use evidence in setting an amount"); *see also Hansen v. Boyd*, 161 U.S. 397, 411-12 (1896) (remittitur is allowed only if the court can "clearly distinguish and separate" the "erroneous part" of the judgment).

The California Court of Appeal echoed that rationale in its recent decision in *Bullock v. Philip Morris USA, Inc.*, --- Cal. Rptr. 3d ----, 2008 WL 240989 (Ct. App. 2d Dist. Jan. 30, 2008), where it rejected the plaintiff's argument that "the appropriate remedy for any instructional error with respect to punitive damages is for th[e] court to reduce the amount of punitive damages awarded by the jury by way of remittitur." *Id.* at *22. The court concluded that a remittitur "would be inappropriate" because the court "[could not] determine how the instructional error that [it had] found affected the amount of the punitive damages award and [it could not] substitute [its] own assessment of the appropriate amount of punitive damages for that of a jury." *Id.*; *accord Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 157 (Ky. 2004) (determining that only a new trial on punitive damages could remedy the jury's

improper use of extra-territorial conduct in calculating punitive damages, and providing model jury instructions and verdict form to guarantee due process in new trial).

2. Other courts like the court below, however, have reached the opposite conclusion by holding that a jury's consideration of improper evidence or improper instructions may properly be remedied by simply reducing the award of punitive damages to the maximum amount due process permits. For example, in *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 71-72 (Ct. App. 1st Dist. 2004), *review granted*, 88 P.3d 497 (Cal. 2004), *review dismissed*, 97 P.3d 814 (Cal. 2004), the jury heard "substantial evidence of wrongful conduct outside California," and the court nonetheless decided that "any error in the consideration of this evidence [would be] sufficiently redressed" by reducing the $50 million award to $9 million, the amount it believed a properly instructed jury would choose. 9 Cal. Rptr. 3d at 71-72; *see Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 805, 812 (Ct. App. 2003) (holding award not limited to party harm would be cured by a reduction to the amount "a properly instructed jury likely would award"), *overruled in part on other grounds by People v. Ault*, 95 P.3d 523 (Cal. 2004).

Similarly, in *Williams v. ConAgra Poultry Co.*, 378 F.3d at 797-98, the Eighth Circuit reduced to the constitutional maximum an award of punitive damages that was based on "evidence of [racial] harassment not suffered by [the plaintiff]."[9]

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[9] More recently, Eighth Circuit Judge Bye has criticized that approach, arguing that "[t]he proper remedy for instruc-

In *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 559-62 (Ind. Ct. App. 1999), the Indiana Court of Appeals likewise approved the reduction of a punitive damages award based on extra-territorial conduct, concluding that the error would be cured by "reduc[ing] the $58 million award to $13.8 million, which represented Ford's retooling costs [to make the Bronco II more stable], along with an additional $54.00 representing the cost for additional hardware installed on each vehicle" – a calculation that was never even presented to the jury as an option. *Id.* at 559.

There is thus a significant conflict among the circuits and the state courts over the proper remedy for improper consideration of nonparty harm. The Court should grant the petition and resolve this recurring question on which it granted review in *BMW*.

B. This Court Should Hold That Judicial Reduction Of The Award To A "Constitutional Maximum" Is Not The Appropriate Remedy For An Award Based On Constitutionally Invalid Instructions.

In this case, the appellate court reduced the punitive damages award to the "highest figure" it deemed

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tional error is a new trial on damages." *See Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 606-607 (8th Cir. 2005) (Bye, J., concurring in result) (explaining that he "[d]id not believe the punitive damages instruction . . . sufficiently limited the jury's consideration to the damages suffered by [the plaintiff]," and arguing that "a remittitur normally should not be used to cure an instructional error" unless a defendant has agreed to it).

consistent with due process, App. 110a, as if the only defect in the jury's award was that it was too high. But the award was tainted because it was based on improper evidence, and that problem should have been remedied through a new punitive damages trial. When the Constitution has been violated, courts must provide a remedy that redresses that violation. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 161-63 (1803). A reduction of punitive damages to the highest amount allowed under the Constitution does not cure – or even address – the constitutional violation. The proper redress is instead to allow an untainted jury to decide the proper amount of punitive damages.

This Court's precedents compel that conclusion. As this Court has held in *Williams*, *State Farm*, and *BMW*, an award can violate due process *either* because it exceeds the due-process maximum, *or* because it impermissibly bases punitive damages on conduct that did not harm plaintiffs. *See Williams*, 126 S. Ct. at 1062-63; *State Farm*, 538 U.S. at 416-17; *BMW*, 517 U.S. at 574-75. These two limitations on punitive damages require different remedies. In the first situation – substantive excessiveness – a reviewing court may remedy an excessive award by reducing it, because the court knows how much the (properly charged) jury awarded, and it is the reviewing court's responsibility to determine the constitutional maximum. *See Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (mandating *de novo* review of the constitutionality of punitive damages awards).

But in the second situation – improper evidence or instructions – a reduction in the award to the con-

stitutional maximum does little to remedy the error because the reviewing court has no way of knowing what weight the jury gave to the improper considerations and thus what portion of the verdict is infected. *See, e.g., White II*, 312 F.3d at 1016. The jury's tainted verdict, of course, provides no helpful starting point. Attempting to "cure" a jury's consideration of improper conduct in awarding punitive damages by reducing the amount of the award is no less unsatisfying than remedying the use of a coerced confession in a criminal trial by reducing the defendant's ultimate sentence.

The reduction of a tainted award cannot cure the procedural errors the trial court made here. Even assuming that there was evidence of harm to plaintiffs that could have justified an award of punitive damages, the jury might have decided to award *no* punitive damages – or at least an amount significantly under the *constitutional* maximum – based solely on the harm to plaintiffs' property. *See* 1 Dan B. Dobbs, *The Law of Remedies*, § 3.11(1), at 458 (2d ed. 1993); *see also, e.g., Smith v. Wade*, 461 U.S. 30, 52 (1983) (a jury generally has the discretion to award zero punitive damages, even when it finds that the factual predicate for punitive damages has been established). When a jury's verdict is infected by the consideration of improper evidence, reduction of the verdict to the maximum allowed by due process does nothing to ensure that the defendant has not been punished based on unconstitutional considerations. This Court should grant certiorari and hold that a new trial is the appropriate remedy.

III. THE COURT OF APPEAL'S IMPOSITION OF A 2:1 RATIO OF PUNITIVE TO

COMPENSATORY DAMAGES DEEPENS A DIVIDE IN THE LOWER COURTS.

Apart from the Court of Appeal's error in failing to identify and remedy the jury's consideration of irrelevant harm to nonparties, the punitive damages award in this case is excessive. This Court recognized in *State Farm* that compensatory damages have a deterrent function, and that when compensatory damages are substantial, a State may have no further interest in punishing and deterring a defendant. *See* 538 U.S. at 419. If punitive damages may be awarded at all in cases of substantial compensatory damages, the Court suggested, the maximum permissible ratio of punitive to compensatory damages is 1:1. Yet the lower courts remain confused regarding when the 1:1 upper limit is appropriate. This Court should grant the petition to provide clarity on this issue.

A. The Decision Below Disregards *State Farm* And Highlights A Split In The Lower Courts Regarding The Permissible Ratio When Compensatory Damages Are Substantial.

The punitive damages award of $112 million was affirmed despite the fact that plaintiffs were awarded $56 million in remediation costs, which far exceeded the actual loss of the $1.5 million value of their property.[10] The Court of Appeal's approval of a

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[10] Louisiana law permits a jury to award as damages the cost of remediating a property, even if that cost exceeds the value of the property itself. *See* App. 63a-67a (discussing *Roman Catholic Church of the Archdiocese of New Orleans v. La. Gas Serv. Co.*, 618 So. 2d 874 (La. 1993)).

2:1 ratio of punitive damages cannot be squared with *State Farm*, which teaches that, at most, a 1:1 ratio is appropriate in this case.

In *State Farm*, this Court addressed the purposes served by punitive damages awards: punishment and deterrence. It recognized that, where "compensatory damages are substantial," there is significant punishment and deterrence even before any amount of punitive damages are awarded. 538 U.S. at 425 (finding substantial $1 million compensatory award). In the amount of a "substantial" compensatory award, therefore, "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded *if* the defendant's culpability, *after* having paid compensatory damages, is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence." 538 U.S. at 419 (emphasis added).[11]

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[11] Indeed, this Court has made clear that, where the State's legitimate interest in punishment and deterrence *is* fully vindicated by a compensatory award, a court has no legitimate basis on which to award punitive damages at all. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence . . . operates through the mechanism of damages that are compensatory"); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332-33 (5th Cir. 1985) (deterrence "may be achieved without awarding exemplary damages" if compensatory damages are large); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (holding punitive damages unconstitutional in certain defamation actions because they are "wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions"); *Bettius & Sanderson, P.C. v. Nat'l Union Fire Ins. Co.*, 839 F.2d 1009, 1016-17 (4th Cir. 1988) (punitive damages unrecoverable against insurance company where a different doctrine of state

But even assuming that some punitive damages are necessary for punishment and deterrence even after a substantial compensatory verdict, *State Farm* teaches that "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. The lower courts have given varying weight to this aspect of *State Farm*, with some strictly adhering to a maximum ratio of 1:1 in cases of substantial compensatory damages, and others disregarding it entirely. For example, several courts have limited the ratio of punitive to (substantial) compensatory damages to roughly 1:1, even in cases involving serious physical harm or intentional misconduct. *See, e.g.*, *Estate of Moreland v. Dieter*, 395 F.3d 747, 757-58 (7th Cir. 2005) ($27.5 million in punitives on $29 million in compensatories for beating and death); *Boerner*, 394 F.3d at 602-03 ($5 million in punitives on $4 million in compensatories for design defect that caused illness and death); *Stamathis v. Flying J, Inc.*, 389 F.3d 429, 443 (4th Cir. 2004) ($350,000 in punitives on $250,000 in compensatories for defamation and malicious prosecution).

By contrast, other courts have sanctioned much higher ratios, effectively ignoring *State Farm*. *See, e.g.*, *Action Marine, Inc. v. Cont'l Carbon, Inc.*, 481 F.3d 1302 (11th Cir. 2007) (ratio of over 5:1 based on $3.2 million in compensatories for claims of trespass and misrepresentation based on company's emission of pollutant), *petition for cert. filed*, 76 U.S.L.W. 3082 (U.S. Aug. 24, 2007) (No. 07-257); *Seltzer v. Morton*,

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law already "punishe[d] the insurer for its bad faith . . . and deter[red] similar conduct by other insurance companies").

154 P.3d 561 (Mont. 2007) (ratio of over 18:1 based on $1.1 million in compensatories for abuse of process and malicious prosecution); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1371-72 (Fed. Cir. 2003) (3:1 ratio based on $15 million in compensatories for patent infringement and related claims); *Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1182 (Or. 2006) (97:1 ratio based on $800,000 in compensatories for fraud).

B. This Court Should Grant Review And Instruct That In This Case Of Substantial Compensatory Damages, Punitive Damages Were Not Warranted At All, Much Less In A Ratio Of 2:1

The Court should use this case as a vehicle to clarify where the outermost limit of due process lies when compensatory damages based on economic harm are unquestionably substantial.

In this case, the $112 million punitive damages award affirmed by the Court of Appeal far exceeds the limits of punishment and deterrence allowed under the Due Process Clause. It is undisputed that plaintiffs suffered only economic injury, App. 55a, and the $56 million compensatory award allows (but does not require) them to completely remediate their $1.5 million property to their own standards – standards far above anything that even the Louisiana Department of Environmental Quality ("DEQ") deemed necessary.[12] Given the solely economic in-

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[12] The DEQ entered this litigation in support of ExxonMobil to point out that the "fail[ure] to follow or apply DEQ regulations in cases involving environmental remediation" results in inflated compensatory damages awards like the one here,

jury and the substantial compensatory damages award that afforded "complete compensation" – and then some – this is the paradigm case in which no punitive damages are necessary to punish or deter. *State Farm* 538 U.S. at 426.

Certainly the amount awarded bears no "reasonable relationship" to plaintiffs' injury. *BMW*, 517 U.S. at 580. As the Court explained in *State Farm*, the careful balancing between punitive and compensatory damages is intended to ensure that any punishment imposed is proportionate to the "*harm suffered by the plaintiff.*" 538 U.S. at 418 (emphasis added). That balancing requires an *accurate* assessment of the plaintiff's harm, not rote multiplication of a "compensatory" award that does far more than compensate. *See id.* at 426 ("The compensatory damages for the injury suffered . . . likely were based on a component which was duplicated in the punitive award."); *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 366 (6th Cir. 2005) (describing ratio of over 6:1 "alarming" and noting that "much of the compensatory damage award must be attributable to [plaintiff's] pain and suffering," which "compel[led] the conclusion that the punitive damage award [wa]s duplicative"). Allowing punitive damages to be based on the multiplication of an already-exaggerated award distorts the balance between

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which in turn result in inflated punitive damages awards. *Amicus Curiae* Br. of La. DEQ 5, *Grefer v. Alpha Technical*, No. 05-C-1590 (La. June 23, 2005). The cost to remediate plaintiffs' property to DEQ standards for unrestricted use was far less than the $56 million award: $46,000 according to ExxonMobil's expert and $1,387,310 according to one of plaintiffs' witnesses. App. at 35-36a.

punishment and compensation and allows plaintiffs to circumvent the limitations of *State Farm* and *BMW* by seeking inflated compensatory damages in the first instance.

In this case, plaintiffs' actual harm for ratio purposes is at most the value of the $1.5 million property, not the $56 million awarded for plaintiffs might use to remediate it. At any rate, no additional punishment or deterrence is necessary beyond the $56 million "compensatory" award.

If this Court's precedent does permit punishment beyond the compensatory damages awarded here, certainly the maximum permissible ratio is 1:1. The Court of Appeal recognized that the $56 million award is undeniably "substantial" within the meaning of *State Farm*, acknowledged *State Farm*'s teaching that a 1:1 ratio is the maximum allowed under such circumstances, and all but sanctioned a 1:1 ratio of punitive to compensatory damages when it stated that, in light of the "substantial" compensatory award and the fact that "plaintiffs claimed only property damage," "a punitive damages award closer to the amount of compensatory damages" was appropriate. *Id.* at 25a, 26a. The Court of Appeal nonetheless imposed, without any explanation, a 2:1 ratio instead. That award cannot be justified by any need for punishment or deterrence, and this Court should grant certiorari to reiterate that *State Farm* does not permit it.

* * *

The punitive damages award in this case defies *Williams* and raises serious constitutional questions left unanswered by *Williams*, *BMW*, and *State Farm*.

Those questions have percolated in the lower courts for a number of years and created significant splits in authority. This Court should grant the petition and (1) hold that plaintiffs are not entitled to any award of punitive damages when the alleged harm that served to make the defendant's conduct reprehensible was suffered (if at all) only by nonparties to the case and not by plaintiffs; (2) set forth the proper remedy for improper reliance upon harms to nonparties; and (3) consider the substantive limits on an award of punitive damages when compensatory damages are substantial. Given the Court of Appeal's manifest failure to apply *Williams*, this Court could summarily reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 14, 2008

APPENDIX A

LOUISIANA COURT OF APPEAL OPINION ON REMAND FROM UNITED STATES SUPREME COURT

No. 2002-CA-1237
COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

* * * * *

JOSEPH GREFER, CAMILLE GREFER, ROSE MARIE GREFER HASSI AND HENRY GREFER,

V.

ALPHA TECHNICAL, ET AL.

* * * * *

APPEAL FROM
CIVIL DISTRICT COURT,
ORLEANS PARISH
NO. 97-15004, DIVISION "A"
HONORABLE CAROLYN
GILL-JEFFERSON, JUDGE

* * * * * *

JUDGE LEON A. CANNIZZARO, JR.

* * * * * *

(COURT COMPOSED OF JUDGE MICHAEL E. KIRBY, JUDGE MAX N. TOBIAS, JR., JUDGE LEON A. CANNIZZARO, JR.)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

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AMENDED, AND AS AMENDED, AFFIRMED

AUGUST 8, 2007

The Supreme Court of the United States ("U.S. Supreme Court") vacated our judgment previously rendered in *Grefer v. Alpha Technical,* 2002-1237 (La. App. 4 Cir. 3/31/05), 901 So. 2d 1117, and remanded the matter for our further consideration in light of its decision in *Philip Morris USA v. Williams*, 549 U.S.____, 127 S. Ct. 1057 (2007).[1]

Factual Summary and Procedural History

The plaintiffs, Joseph Grefer, Camille Grefer, Rose Marie Grefer Haase and Henry Grefer ("the Grefers"), filed suit in August of 1997 against the defendants, Exxon Mobil Corporation ("Exxon") and Intracoastal Tubular Services, Inc. ("ITCO"), among others, to recover damages for the contamination of a 33-acre tract of land with radioactive material.[2] Between 1968 and 1992, ITCO, an oil field service company, had leased the land from Mrs. Camille Grefer for its business operations, which included the cleaning, inspecting, testing, threading, transporting and storage of oil well tubulars (pipe) for Exxon and other oil companies.

The Grefers asserted causes of action in negligence, strict liability, absolute liability, nuisance,

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[1] *Exxon Mobil Corporation. v. Grefer*, 549 U.S. ____ , 127 S. Ct. 1371, 167 L. Ed. 2d 156 (2007).

[2] The immovable property at issue was part of a larger tract of land purchased by the plaintiffs' great grandfather in 1875 and since then has remained in the Grefer family. The plaintiffs acquired the naked ownership of three-fourths (3/4ths) of the immovable property in February 1945 upon the death of their father, Archibald J. Grefer, Sr., and full ownership of the entire tract in March 1996 upon the death of their mother, Camille Claire Antoine Grefer.

fraud, and breach of contract. They sought compensatory damages for the loss of use and remediation of the property as well as punitive damages pursuant to La. C.C. art. 2315.3.[3] After a five-week trial, the jury returned a verdict in favor of the Grefers and awarded them compensatory damages in the amount of $ 56,145,000.00, which included $ 145,000.00 in general damages and $ 56,000,000.00 in restoration costs (special damages), as well as exemplary (punitive) damages in the amount of one billion dollars. The jury allocated 85% of the fault to Exxon, 5% to ITCO, and 10% to two absent defendants. The jury also found that "ITCO [was] entitled to recover from Exxon all amounts awarded against ITCO under its counterclaim against Exxon[.]" After the trial court held a separate hearing to consider the merits of an exception of prescription filed by Exxon, the trial judge rendered a judgment denying the exception and a judgment in accord with the jury's verdict. Exxon, ITCO and the Grefers appealed. On appeal, we amended the judgment reducing the one billion dollar punitive award to $ 112,290,000.00, an

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[3] La. C.C. art. 2315.3 was originally enacted as La. C.C. art. 2315.1 by Acts 1984, No. 335, § 1. It was redesignated as Article 2315.3 under the authority of the Louisiana State Law Institute in 1986. It was repealed by Acts 1996, 1st Ex. Sess., No. 2, § 1, effective April 16, 1996. Article 2315.3 had provided:

> In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances. As used in this Article, the term hazardous or toxic substances shall not include electricity.

amount equal to twice the compensatory award, and affirmed the judgments in all other respects. *See Grefer, supra.* The Grefers and Exxon applied for Writs of Certiorari to the Louisiana Supreme Court, which were denied.[4]

Exxon subsequently filed motions to stay the execution of the judgment with both the Louisiana Supreme Court and the U.S. Supreme Court, which were denied.

Thereafter, Exxon applied to the U.S. Supreme Court for a Writ of Certiorari, which the Court granted, vacating our decision and remanding the matter for further consideration. *See n. 1, infra.*

The Philip Morris case

In *Philip Morris*, the U. S. Supreme Court vacated the decision of the Oregon Supreme Court that had upheld an award of punitive damages against Philip Morris. The U.S. Supreme Court found that although a plaintiff who seeks punitive damages may show harm to others who are nonparties to the litigation as a means of demonstrating the reprehensible nature of the defendant's conduct, a jury may not use punitive damages to punish a defendant "directly on account of harms it is alleged to have visited on nonparties." *Philip Morris*, 549 U.S. at____, 127 S. Ct. at 1064. The Court additionally found that the *Due Process Clause of the United States Constitution* requires that the States make assurances that

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[4] *Grefer v. Alpha Technical, 2005-1590, 2005-1259 (La. 3/31/06), 925 So. 2d 1248.*

juries are not basing punitive damage awards on improper precepts. That is, although a jury may consider the reprehensibility of the defendant's conduct in determining that punitive damages are warranted, it may not consider and ultimately punish a defendant for the harm caused to those who are not parties to the litigation.

The *Philip Morris* case arose out of the death of Jesse D. Williams, a heavy cigarette smoker. The plaintiff, Mr. Williams' widow, Mrs. Mayola Williams, represented his estate in the lawsuit filed in Oregon state court against Philip Morris, the manufacturer of Marlboro, the decedent's favorite brand of cigarette. The plaintiff sought compensatory and punitive damages against Philip Morris.

At the conclusion of the trial, Philip Morris had requested that the trial court give to the jury an instruction with regard to punitive damages. The requested instruction prohibited the jury from making an award of punitive damages for the impact of the defendant's alleged misconduct on other persons who may bring their own lawsuits in which juries can resolve their claims and award punitive damages for those harms as such juries see fit. The trial court refused to give the instruction and Philip Morris objected. This was the sole basis upon which the U.S. Supreme Court granted Philip Morris' writ application. We are to now consider the *Philip Morris* decision in resolving *Grefer* as the U.S. Supreme Court directed.

The jury instructions in *Grefer*

At the trial in *Grefer*, Exxon proposed two jury

instructions with respect to exemplary damages. The first, Exxon's Proposed Instruction 17, reads as follows:

EXEMPLARY DAMAGES -- GENERALLY

In this particular case, Louisiana law permits you to consider an additional element of damages called exemplary damages (or called "punitive damages" in other states).

You may only award exemplary damages if the plaintiffs prove, by a preponderance of the evidence, that:

(1) the defendant's conduct was wanton and reckless;
(2) the danger created by the defendant's wanton and reckless conduct threatened or endangered public safety;
(3) the defendant's wanton and reckless conduct occurred in the storage, handling, or transportation of hazardous or toxic substances; and
(4) the plaintiffs' damages were caused by the defendant's wanton and reckless conduct.

The phrase "wanton and reckless" means a conscious indifference to consequences, amounting almost to a willingness that harm to the public safety would follow. Stated another way, wanton and reckless conduct is that which amounts to intentional

and deliberate action that has the character of outrage frequently associated with crime.

Unless you find that the defendant acted with almost a willingness that harm to the public safety would follow, then you may not award exemplary damages.

Even if you decide that the plaintiffs are entitled to exemplary damages, you may not award such damages for conduct that the defendants engaged in before 1984 or after 1996. Under Louisiana law, the plaintiffs are not entitled to exemplary damages for conduct that the defendants engaged in before 1984 or after 1996. [footnote omitted]

The second instruction, Exxon's Proposed Instruction 18, states,

EXEMPLARY DAMAGES -- DISCRETIONARY

Exemplary damages are within your discretion. This means that even if you find that the defendants' conduct was wanton or reckless, you are not required to award exemplary damages to the plaintiffs. [footnote omitted]

The trial judge rejected the aforementioned instructions proposed by Exxon and instructed the jury on exemplary damages as follows:[5]

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[5] For ease of reference, we have numbered the paragraphs in the jury instructions.

(1) Under our law, in addition to the award of damages to compensate a plaintiff for the injuries suffered, you may award exemplary damages against a defendant when the plaintiff shows that the defendants were wanton or reckless in their disregard for public safety in the storage, handling or transport of hazardous or toxic substances.

(2) For the purposes of awarding exemplary damages, "wanton" and "reckless" mean something more than mere negligence. The defendant must have known that public safety was at risk or should have known it was highly probable that harm to the public would result from his conduct. In other words, in order to find "wanton" or "reckless" conduct, a plaintiff must prove the defendant's alleged acts and omissions of negligence were accompanied by a conscious indifference to consequences amounting almost to a willingness that harm to the public safety would follow.

(3) Exemplary damages are regarded as a fine or penalty for the protection of the public interest. Such damages are given to the plaintiff over and above the full compensation for the plaintiff's losses for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example. Exemplary damages are not awarded to benefit the injured party but to compel the wrongdoer to have due and proper regard for the rights of the public. You should award an amount of exemplary damages which you

feel will be reasonably likely to accomplish that purpose in this case.

(4) Another factor you may consider in determining the amount of exemplary damage award is the nature and the extent of the harm to the plaintiffs. You may also consider each defendant's financial position when determining the amount of exemplary damages to be awarded because the award is meant to be meaningful enough to actually deter wrongful conduct.

(5) Even if you decide that the plaintiffs are entitled to exemplary damages, you may not award such damages for conduct that the defendants engaged in before 1984 or after 1996.

(6) Exemplary damages are within your discretion. This means if you find that the defendant's conduct was wanton or reckless, you are not required to award exemplary damages to the plaintiffs.

Discussion

The trier of fact may consider the following factors in awarding exemplary damages:(1) the nature and extent of the harm to the plaintiff; (2) the reprehensibility of the defendant's conduct; (3) the wealth or financial position of the defendant; (4) the imposition of punishment on the defendant; (5) the deterrent effect, i.e. whether it will deter future or similar conduct by the defendant and others. *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439, n. 12, 121 S. Ct. 1678, 1688, n. 12, 149

L. Ed. 2d 674 (2001); Restatement (Second) of Torts § 908, Comment e (1979).

In instructing the jury with respect to whether exemplary damages should be awarded to the Grefers, the trial judge set forth a correct statement of the law. The trial judge referred to harm or the potential (risk of) harm to nonparties resulting from the defendant's conduct when she referred to the public safety in her explanation of "wanton" and "reckless" conduct. As the reprehensible nature of the defendant's conduct is a factor which the jury may consider in deciding whether exemplary damages are warranted and, if so, the amount that should be awarded, this instruction was permissible under the standards set forth by the U.S. Supreme Court in *Philip Morris* (a plaintiff may show harm to others in order to demonstrate reprehensibility).

The trial judge's only other reference to nonparties occurred when she instructed the jury that exemplary damages were awarded not to benefit the plaintiff but to punish the defendant, to compel the defendant to have "proper regard for the rights of the public," and to deter others from following the defendant's example. The U.S. Supreme Court has found no constitutional violation in imposing punitive damages "to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition." *Philip Morris*, 549 U.S. at ____ , 127 S. Ct. at 1062, citing BMW of North America, Inc., v. Gore, 517 U.S. 559, 568, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). Thus, the trial court's reference to nonparties within the context of the public's interest and safety did not violate the defendant's rights to due process.

Essentially, paragraphs two and three of the trial

judge's instructions on exemplary damages explained reprehensibility, i.e. "wanton" and "reckless" conduct as well as informed the jury that the award should punish the defendant and deter similar conduct. All three of these factors are permissible under the standards set forth by the U.S. Supreme Court and the courts of this state.

Lastly, in paragraphs four, five and six, the trial judge charged the jury that they were to consider the harm done to the plaintiff, the defendant's financial condition, the time periods for which exemplary damages were to apply, and that an award for such damages was solely within their discretion. None of these factors is objectionable or prohibited.

When we consider the totality of the trial court's jury instructions on exemplary damages, we find they are both permissible and constitutional. Moreover, even though the record does not include the objections made by Exxon to the instructions during the jury charge conference, two facts should be noted. First, unlike the defendant in *Philip Morris*, Exxon raised no assignment of error on appeal as to either the trial court's jury instructions or to the trial court's refusal to give Exxon's proposed jury instructions. Second, for all intents and purposes, the trial court's instructions tracked almost verbatim Exxon's proposed instructions. Thus, we find the trial court's jury instructions herein pass constitutional muster.

The question we are ultimately asked to decide is whether Exxon received a fair trial. In other words, in light of *Philip Morris*, was Exxon afforded all of the constitutional protections available under the *Due Process Clause of the U.S. Constitution*? We answer this "yes."

Exxon's Wanton and Reckless Conduct

Exxon argued in the first appeal that the jury's award of exemplary damages must be vacated because the record does not support a finding that Exxon engaged in wanton and reckless conduct as required under La. C.C. art. 2315.3.

The statute providing for exemplary damages for wanton and reckless disregard for public safety in the storage, handling or transportation of hazardous or toxic substances must be strictly construed, as it imposes a penalty. *Bonnette v. Conoco, Inc.*, 2001-2767, p. 27 (La. 1/28/03), 837 So. 2d 1219, 1236-37. To obtain an award of exemplary or punitive damages under La. C.C. art. 2315.3, the plaintiff must prove:(1) that the defendant's conduct was wanton and reckless by proving that "the defendant proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position," or that the defendant engaged in "highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent;" (2) that the danger created by the defendant's wanton or reckless conduct threatened or endangered public safety; (3) that the defendant's wanton or reckless conduct occurred in the storage, handling or transportation of hazardous or toxic substances; and (4) that the plaintiff's injury was caused by the defendant's wanton or reckless conduct. *Id.*; *Billiot v. B.P. Oil., Co.*, 93-1118, pp. 16-17 (La. 9/29/94), 645 So. 2d 604, 613.

As set forth in our prior opinion, our review of the record disclosed sufficient evidence to support the jury's finding that Exxon had engaged in wanton and

reckless conduct. Exxon first learned of NORM[6] contamination in oilfield drilling equipment in 1981, when Occidental Petroleum, another oil company, discovered it on its platforms in the North Sea. At that time, Dr. Andrew Lloyd Smith, a Scottish environmental consultant, was working for Occidental Petroleum in the U.K., and following the discovery, was a member of the United Kingdom Offshore Operators Association (UKOOA) Safety Committee that drafted and published the UKOOA safety guidelines and Reference Manual that were given to all oil companies operating in the North Sea. ITCO offered Dr. Smith as a health and safety expert witness at trial. According to Dr. Smith, the reference manual was extensive and covered both the identification of radioactive scale and the procedure to follow up on such identification. The guidelines, promulgated by the oil and gas industry and approved by the U.K.'s National Radiological Protection Board ("NRPB"), recommended the specific steps to minimize or eliminate the effect of NORM on public health and the environment.

Though Exxon was abreast of the problem, it took no action to survey its wells elsewhere. The depositions of Mr. John Rullman, Director of Exxon's Eastern Division Environmental and Regulatory Affairs, and of Mr. Everett C. Hutchinson, Exxon's Assistant Director of Environmental and Regulatory Affairs, were introduced into evidence and read to the jury at trial. Mr. Rullman testified that he had obtained a copy of the UKOOA safety guidelines and found they were very onerous, restrictive, and inflexible. He also

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[6] "NORM" is the acronym for Naturally Occurring Radioactive Material.

admitted that he was not sure if at that time Exxon had the same problem in the U.S. Mr. Hutchinson, too, believed the UKOOA guidelines were unreasonable for Exxon's production operations in the U.S. Mr. Booher, Exxon's industrial hygienist, admitted that if Exxon had surveyed its wells prior to the Chevron discovery in the U.S. in 1986, then it would have discovered radium in its wellheads much sooner.[7]

In May 1986, after learning of Chevron's NORM discovery in Mississippi, Exxon surveyed its Mississippi well sites and found radiation accumulation in its equipment. Twice Exxon officials were notified that the cleaning contractors had to be informed of the radioactivity, as it posed a health and safety hazard, but they still did nothing to warn them.

The evidence further disclosed that by August 1986 Exxon was clearly worried about governmental regulation and losing the produced water exemption, which allowed it to dispose of the by-product in an unregulated manner. A memo written on August 28, 1986, by Mr. Howard Collier, Exxon's director of Environmental and Regulatory Affairs, stated, "Chevron has taken a very high profile approach to handling their discovery of radiation in Mississippi and many agencies are now involved." Mr. Collier expressed an interest in "[getting] the industry and the regulatory agencies to slow down." Then he admitted,

> Chevron's discovery is nothing new. After all, if there wasn't some radiation in down-hole

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[7] On April 10, 1986, Chevron identified radium-266 in oil filed equipment at a well site in Brookhaven, Mississippi.

> formations, it would be difficult to run a gamma ray log. My primary concern is the current investigation and analysis not unduly influence the EPA who is in the process of deciding under RCRA [Resource Conservation Recovery Act] whether produced water should be classified as a hazardous waste and handled as such.

Mr. Booher's notes taken from comments made by Mr. Collier at an Exxon NORM meeting in Houston on January 8, 1987, indicate the cost of losing the RCRA exemption for produced water as $ 750 million in the first year and $ 150 million for each year thereafter. At that same meeting, several Exxon officials concluded that notifying the cleaning contractors would be "premature."

The evidence also disclosed that Exxon was concerned about litigation arising from the NORM discovery in Mississippi. Street, Inc., a pipe yard company in Mississippi, had filed suit against Chevron and other oil companies (not Exxon), for $ 35 million, claiming negligence for failure to advise that pipe delivered to it was contaminated with radioactive material. Mr. Hutchinson, in an internal memo copied to Mr. Rullman, recognized the possible "need to manage the disposal of large accumulations of contaminated scale, such as could occur at a pipe yard." Mr. Rullman, in a confidential memo dated October 14, 1986, noted ITCO was a potential "look alike" to Street, Inc., and stated, "If potential exists for radioactive material accumulation, perform low key radiation exposure measurements;" "Coordinate ITCO plan with Eastern Division;" and "Consider advisory letter to ITCO with Headquarters involvement."

Still, Exxon did nothing to notify ITCO.

Eventually, Exxon sent the letter notifying the cleaning contractors of the NORM problem in March 1987, ten months after it had identified the problem at its domestic well sites. On March 27, 1987, Exxon representatives met with Mr. John Hooper, president of ITCO, and other ITCO employees and gave them a video and a set of procedural guidelines to follow when handling NORM contaminated equipment. According to Mr. Hooper, Exxon's videotape made the health risks associated with NORM scale sound minor and the safety procedure guidelines merely suggested taking precautions to avoid breathing or ingesting airborne dust. At that time, Exxon's representatives made no mention of the likely buildup of radioactive scale on ITCO's premises even though Exxon knew the pipe scale had been accumulating on the premises for years and had learned in June 1986 that it was hazardous.

Exxon maintained that no reasonable juror could have concluded that it knew about the NORM buildup in domestic oil production tubing before 1986. We disagreed. Although the 1981 discovery of NORM inside drilling equipment was limited to the North Sea area, by that time Exxon already knew that Shell Oil had found radioactive material in equipment at a refinery in the U.K. The jury could have concluded that Exxon knew or should have known of the likelihood of NORM contamination in domestic oilfield production equipment well before Chevron's Mississippi discovery in 1986 based on Exxon's knowledge that radioactive material had been found in both drilling and refining equipment in the North Sea region coupled with the fact that just a few years earlier Exxon had discovered radio-

active deposits inside equipment at several Texas gas plants. Also, in view of Mr. Collier's August 28, 1986 memo, stating, "Chevron's discovery is nothing new," the jury reasonably could have concluded that Exxon knew about the NORM deposits in its domestic oilfield equipment before 1986, and its failure to act sooner was wanton and reckless.

Exxon argued, too, that it acted to protect the public safety after Chevron's 1986 NORM discovery. Exxon emphasized that after the discovery it had conducted a nationwide NORM survey of all its facilities; it began screening used tubing for NORM at production sites and the contaminated tubing was stored -- not cleaned; it began to screen tubing at central storage facilities like ITCO; it recommended safety procedures; and it began to develop a new cleaning process that would allow for the previously-stockpiled, NORM contaminated pipe to be cleaned safely.

We found no merit to Exxon's argument. Clearly, the evidence indicated that the action taken by Exxon after the Chevron discovery was to benefit Exxon, not the general public. As a result of the discovery, Exxon was faced with unprecedented environmental, legal, economic, and financial challenges. It had no choice but to act. In any event, we found Exxon's most egregious act was failing to notify ITCO of the NORM hazard immediately after it tested the Exxon Mississippi wells and discovered NORM at the well sites. Although Exxon's representatives claimed that to notify the cleaning contractors immediately would have been "premature" until they knew the extent of the problem and they did not want to "alarm" the public, we concluded that their failure to do so was inexcusable. Exxon executives

had been warned that NORM posed a human safety hazard to anyone exposed to it, but they waited nine months to send the warning letter to the contractors and to meet with ITCO. Exxon's delay in notifying ITCO of the danger was wanton and reckless.

Upholding the jury's finding that punitive damages were warranted in this case, we then considered whether the jury's one billion dollar award was constitutional.

Constitutionality of Punitive Damage Award

Exxon had assigned as error in the first appeal that the $ 1 billion punitive damage award was unconstitutional as it violated Exxon's *Fourteenth Amendment* right to due process of law.

In recent years, the U.S. Supreme Court has considered several cases raising exemplary damage issues. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), the Court ruled that exemplary damage awards that are "grossly excessive" violate the Due Process Clause of the Fourteenth Amendment. The Court then provided three "guideposts" for gauging when an exemplary damage award crosses the constitutional line:(1) the reprehensibility of the defendant's conduct; (2) the ratio between the exemplary damage award and the harm the defendant's conduct caused, or could have caused; and (3) the size of any civil or criminal penalties that could be imposed for comparable misconduct.

The constitutional constraints on the amount of exemplary awards were again considered in *Cooper Industries, Inc., supra*, 532 U.S. 424, 121 S. Ct. 1678, wherein the Court ruled that state and federal appellate courts must conduct a *de novo* review of exemplary damage awards challenged as being grossly

excessive under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 433-434, 121 S. Ct. at 1685-1686. In mandating a *de novo* review, the Court reasoned that "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." *Id.* at 437, 121 S. Ct. at 1686.

In *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), the Court further tightened the permissible limits of exemplary awards, holding that appellate "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.*, 538 U.S. at 426, 123 S. Ct. at 1524.

Keeping in mind the principles outlined in *BMW of North America, Inc., v. Gore*, the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, we conducted a *de novo* review of the jury's exemplary damage award. Our findings as a result of that *de novo* review were set forth in our prior opinion and read as follows.

> "[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore, supra*, at 575, 116 S. Ct. 1589. In determining the reprehensibility of a defendant, courts are instructed to consider whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the

target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. 517 U.S. at 576-577, 116 S. Ct. 1589. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should be awarded only if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.* at 575, 116 S. Ct. at 1589.

In this case, it is undisputed that the plaintiffs suffered strictly economic harm, i.e., property damage. While Exxon's conduct resulted in no physical harm to them, it certainly evinced an indifference to or reckless disregard of the health and safety of others. As stated above, Exxon's nine-month delay in notifying ITCO and the other cleaning contractors of the dangers posed from handling NORM contaminated equipment certainly put their employees at risk. Even though ITCO no longer cleaned NORM contaminated piping/tubulars after March 1987, Exxon was well aware that NORM contaminated equipment remained stockpiled on

ITCO's property. This posed a health hazard to those on the premises.

We also find that the target of the conduct was financially vulnerable. ITCO had leased the property from the Grefer family for many years and during that period operated a very successful business cleaning oilfield equipment. After Exxon discovered the NORM contamination in its drilling equipment and finally realized the extent of the problem, the oil company sought to wipe its hands clean and leave ITCO with the mess. Notably, on April 19, 1989, Mr. Rullman sent a memo to Mr. Roger Koerner, Exxon's top manager for the Eastern Division, regarding "ITCO Contract Recommendations." The memo stated in part:

> RAE [Exxon's Regulatory Affairs Engineering] concurs with the suggestion to screen other contractors to ascertain their abilities to decontaminate NORM material, ...The development of alternative cleaning/disposal options would help soften their stance [on contract negotiations] and may be needed anyway if the ITCO procedure does not provide sufficient cleaning. The continued use of the ITCO yard could complicate any potential personal injury liability claims since it would be difficult to determine when the exposure occurred that caused the injury. Resuming cleaning with a new contractor would clearly establish the earliest date of potential exposure,

> and Exxon could better contractually minimize its exposure with the new contractor. This would not, however, help Exxon with any claims from past activities at ITCO.

Shortly thereafter, ITCO's business steadily declined while Exxon sent its used oilfield equipment to new cleaning contractors. After ITCO ceased operations, terminated its lease and vacated the premises, Exxon's NORM scale remained on the premises. In addition to ITCO's failure, the Grefers are now financially burdened with the task of remediating the property.

Furthermore, we find Exxon's repeated conduct from 1985 through 1992, when ITCO finally shut down, did involve an element of deceit. Again, as mentioned above, from June 1986 to March 1987 Exxon officials intentionally withheld information regarding NORM contamination in the piping/tubulars even though they knew the scale posed a direct danger to the physical health and safety of those workers who continued to handle the NORM contaminated equipment on a daily basis. Also, after learning of the danger posed by the NORM contaminated scale, Exxon took no step to remove the radioactive material from ITCO's premises. In our opinion, Exxon's conduct was reprehensible.

Next we consider the second *Gore* guideline, the disparity between actual or potential harm suffered by the plaintiff and the punitive damage award. For potential harm

properly to enter into the ratio, it must be directly attributable to the misconduct and not to lawful or unrelated causes. *See Cooper Industries*, 532 U.S. at 441, 121 S. Ct. at 1688.

In *Campbell*, the Utah Supreme Court justified a punitive award of $ 145 million in a case in which the plaintiff was awarded $ 1 million in compensatory damages for State Farm's bad-faith failure to settle, fraud, and intentional infliction of emotional distress. On appeal, the U.S. Supreme Court considered the award under the *Gore* guideposts and concluded that the award was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. *Campbell*, 538 U.S. at 429, 123 S. Ct. at 1526. While the Court declined to impose a bright-line ratio which punitive damages cannot exceed, it noted that its jurisprudence and the principles set forth therein demonstrate that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. The Court recognized that although "there are no rigid benchmarks," a higher ratio could be justified only if "a particularly egregious act has resulted in only a small amount of economic damages." *Id.*, 538 U.S. at 425, 123 S. Ct. at 1524. The Court also noted that the converse is true, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* The

Court found the compensatory award of $ 1 million was "substantial," and concluded that the *Gore* guideposts "would [only] justify a punitive damages award at or near the amount of compensatory damages." *Id.*, 538 U.S. at 429, 123 S. Ct. at 1526. The Court also rejected the Utah Supreme Court's reference to State Farm's enormous wealth to justify the award, stating, "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id.*, 538 U.S. at 427, 123 S. Ct. at 1525.

This case leaves little doubt that there is a presumption against an award that has an 18 to 1 ratio. In our opinion, the compensatory award in this case was substantial; the Grefers were awarded $ 56,145,000.00 for a piece of property worth at most $ 1,500,000.00. Although the plaintiffs claimed only property damage, and no physical harm, the trial court allowed the plaintiffs to argue and present substantial evidence, over Exxon's objections, of the potential and/or alleged actual harm to other persons who were not parties to this suit and whose claims were not before the jury. For example, in their opening statement, the plaintiffs' counsel referred to the "community" and "churches immediately next to" the Grefer property. He described radium particles in "a very, very, very fine powder" being blown "all over the place." A video was shown to the jury that depicted elementary school children getting on and off a bus. Witnesses were then asked questions designed to foment the fear

of a radium dust cloud blowing over houses, churches, and schools near the Grefer property. The trial court also allowed plaintiffs' counsel to question witnesses about the potential harm of radiation to children and unborn children even though this case is strictly a claim for damage to immovable property. Likewise, the trial court allowed plaintiff, Rose Grefer Haase, a former nurse, to testify regarding the effects of x-ray radiation and the protections taken by those working with x-ray machines to avoid personal injury. The trial ended with a neighbor, Ms. Thelma Benjamin, testifying on rebuttal about the DEQ and Exxon failing to test her property or the property of others in the neighborhood. Plaintiffs' counsel likened the harm suffered by the Grefers with damages caused in the 1989 EXXON-VALDEZ oil spill. Much of this evidence was irrelevant and, more than likely, confused the jury, contributing to its exorbitant punitive damage award. (footnote omitted)

The plaintiffs also put on substantial evidence regarding Exxon's wealth. The jury heard that Exxon is the largest corporation in the world and had assets of $ 251 billion; that its revenue for the year 2000 was $ 228.439 billion; and that its total net worth in 2000 was $ 173 billion. In addition, evidence was presented of the salaries, bonuses, stock options, etc., of Exxon's corporate executives. The jury heard that the only way to punish a big corporation like Exxon for its reprehensible behavior was to hit its bank

account. Plaintiffs' counsel stated that Exxon could satisfy a large punitive judgment in very little time with the interest that accrues on its $ 72 billion in shareholders' equity and that it likely would never feel the effect of the judgment because it would be passed on to the consumers at the gas pumps. Counsel also pointed out that Exxon recently had been cast in judgment for several other large punitive damage awards, including a case in which an Alabama jury awarded the plaintiffs punitive damages of $ 3.4 billion and compensatory damages of $ 87 million. Such assertions bore no relationship to the harm suffered by the plaintiffs. Although the jury could consider Exxon's wealth, the company's wealth could not provide an open-ended basis for inflating the punitive award. With this in mind, we find the $ 1 billion dollar punitive damage award is neither reasonable nor proportionate to the amount of harm to the plaintiffs and to the general damages recovered. Considering the substantial compensatory damages awarded in this case, in our opinion a lesser single-digit ratio would be appropriate.

The third guidepost in *Gore* is the disparity between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. The Court in *Campbell* noted that criminal penalties may also be considered, as the existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. *Campbell*, 538 U.S. at 428, 123 S. Ct. at

1526. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. *Id.* Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, its higher standard of proof. *Id.* Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically justify a punitive award. *Id.*

Exxon argues that it did not violate any state laws or regulations because the DEQ did not establish NORM regulations until 1989 (footnote omitted) and therefore the punitive damage award is not warranted. It also argues that the maximum civil penalty under Louisiana law for willful conduct would not exceed $ 1,000,000.00, and thus if punitive damages are imposed, the amount should not exceed $ 1,000,000.00.

In the case of *In re New Orleans Train Car Leakage Fire Litigation*, 2000-0479, p. 1 (La. App. 4 Cir 6/27/01), 795 So. 2d 364 (hereinafter "*CSX*"), we affirmed the trial court's reduction of a jury's punitive damage award from $ 2.5 billion to $ 850 million. That case involved personal injury claims by 8,047 class members for injuries arising out of a burning train car carrying a hazardous substance. In reaching our result, we recognized the large number of claimants, their personal injury, the potential that many city blocks could have been destroyed by an ex-

plosion, and the evacuation of thousands during the night because of the danger posed by burning chemicals. Like Exxon, the defendant argued in *CSX* that because the maximum civil penalty under Louisiana law for its violation was slightly more than $ 1,000,000.00 that should have been the amount of the jury's punitive award. We disagreed, noting that "the *BMW* Court did not select and use the term 'guideposts' without reason", and that term does not "connote or suggest a cumulative series of three 'tests' or 'elements' which must be met." *CSX*, at p. 33, 795 So. 2d at 386. We then specifically rejected the notion "that the third guide . . . 'caps' punitive damages." *Id.* at p. 33, 795 So. 2d at 386-87.

The plaintiffs point to various criminal fines for violations of Louisiana statutes and regulations and give examples in which fines of tens of thousands of dollars a day would be imposed every day for the years Exxon was in violation of the law. Notably, in *Cooper*, the Court rejected an effort, similar to the plaintiffs' here, to suggest that the maximum fine provided by an Oregon statute would have been imposed each time a piece of promotional literature was distributed, 532 U.S. at 442-43, 121 S. Ct. at 1689, while in *Campbell* the Court rejected an attempt to justify a large award based on speculation about whether, in a criminal prosecution, the defendant might have lost its business, license, been imprisoned, or been required to disgorge all profits.

> The fact that Louisiana had no regulations governing NORM until 1989 does not excuse Exxon's reprehensible action. And Louisiana's maximum civil penalty for willful misconduct, alone, cannot limit a punitive damage award. Nonetheless, based on our review of the record, we find that $ 1 billion punitive award in this case is exorbitant and must be reduced.
>
> In summary, we find that an application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded, likely would justify a punitive damages award closer to the amount of compensatory damages. The punitive damage award of $ 1 billion, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of Exxon's property. Therefore, we will amend the jury's award to reduce it to an amount that we have determined is both reasonable and proportionate to the amount of harm suffered by the Grefers and to the general damages of $ 56,145,000.00, which is $ 112,290,000.00 or twice the general damage award.

Grefer, supra, 2002-1237 at p. 46-53, 901 So. 2d at 1148-1152.

Clearly, as noted above, the conduct of Exxon satisfied the wanton and reckless requirement, *i.e.* it was reprehensible. Any reference to harm suffered by nonparties, which Exxon finds objectionable, was used in the foregoing discussion merely to demon-

strate the reprehensibility of Exxon's conduct and nowhere in the opinion do we use any evidence of harm suffered by nonparties as the basis to award an amount for exemplary damages to the Grefers. Again, any discussion of harm to nonparties was done simply to show reprehensibility. The record amply supports the finding that Exxon's conduct was reprehensible.

Second, our opinion takes into account all of the objections and concerns raised by Exxon herein in light of *Philip Morris*. We noted those objections and essentially sustained them in our review. We find that many of the improper arguments and evidence contributed to the verdict which in no way reflected the harm suffered by the plaintiffs and the compensatory damages which were awarded.

Third, our *de novo* review resulted in a drastic reduction of the jury's $ 1 billion punitive damage award. In reviewing the matter *de novo,* we disregarded the evidence of and references to harm suffered by nonparties and considered only the harm done to the Grefers in determining the amount of the punitive damage award.

Fourth, although our *de novo* review essentially awards exemplary damages based on the *State Farm* multiplier and the compensatory award, we still consider the reprehensibility of Exxon's conduct as well as the degree of reprehensibility in our award of exemplary damages. Additionally, the punitive damage award rightfully takes into account the fact that Exxon should be punished for its reprehensible conduct and deterred from repeating it. The fact that Exxon is one of the wealthiest companies in the world was another factor that we properly considered.

Summary

In this opinion we elaborate and expand on the thought process that went into our earlier opinion. But after reviewing this record and the *Philip Morris* decision, we stand by our initial decree with regard to the award of exemplary damages.

We interpret the remand from the U.S. Supreme Court to affect our decision as it relates to the exemplary damages and it is our opinion that the decision in no way mandated that we review the remaining assignments of error urged by Exxon and that it in no way affects our initial decision with regard to the compensatory award. Furthermore, the U.S. Supreme Court remand and the *Philip Morris* decision do not mandate that we order a new trial but instead allow us to correct any procedural and or substantive errors by our constitutionally delegated authority of *de novo* review. This court is constitutionally allowed to review both law and facts. La. Const. art. V, § 10 (B).

As a final thought on the issues of reprehensibility and harm to the plaintiff, we note that during the oral argument, Exxon's attorney suggested that with regard to harm to nonparties, when considering reprehensibility, the trier of fact can only consider the harm to nonparties that is similar to the harm or injury suffered by the plaintiff. That analysis is not supported by *Philip Morris*, *State Farm*, or *BMW*.

In determining the reprehensibility of the defendant's conduct for the purpose of awarding exemplary damages, the trier of fact may consider the harm suffered by both parties and nonparties regardless of the type or similarity of harm suffered as a result of that conduct. On the other hand, the trier

of fact may consider the nature and extent of the harm suffered by the plaintiff only in determining the amount of exemplary damages to award that particular plaintiff.

Finally, Exxon cites the decision in *Embry v. Geo Transportation of Indiana, Inc.*, 478 F. Supp. 2d 914 (E.D. Ky. 2007), arguing that the punitive damage award cannot stand in this case because Exxon's delay in warning persons of the NORM danger did not cause the plaintiffs property damage but rather only potential harm to nonparties.

In *Embry*, the defendant's truck crossed the median into oncoming traffic and caused multiple deaths and injuries. The defendant truck driver admitted that after taking a sip of coffee he choked and lost control of the truck, causing the accident. The plaintiffs argued that the defendant truck driver had fraudulently concealed his negative medical history on his job application, including that he was a recovering alcoholic, and alleged on this basis that the defendants were liable for punitive damages.[8] Citing *Philip Morris*, the court granted summary judgment dismissing the plaintiffs' punitive damage claims explaining that none of the alleged fraudulent acts or omission proximately caused the plaintiffs' damages and, therefore, did not satisfy the "constitutional nexus requirement." *Id.* at 924.

The *Embry* case is distinguishable from the case before us. The court clearly recognized that the defendant truck driver's failure to disclose his medical

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[8] Punitive damages are available under Kentucky law if a plaintiff proves by clear and convincing evidence that a defendant acted with oppression, fraud or malice. Ky. Rev. Stat. Ann. § 411.184(2) (West 2006).

history in applying for his job and commercial driver's license several years earlier did not cause the accident. The court also noted that the plaintiffs failed to demonstrate that it was foreseeable from the fraudulently concealed medical information that the defendant would choke on coffee while driving, so as to establish that the fraud was a proximate cause of the accident. Here, we found that Exxon's failure to disclose the NORM hazard to ITCO in a timely manner demonstrated the reprehensibility of its conduct, a factor we could consider in awarding exemplary damages to the Grefers. Although Exxon's delay in disclosing the NORM hazard did not cause the Grefers physical harm, it increased their economic damages by allowing the continual accumulation of NORM scale on their property.

DECREE

Accordingly, for the reasons set forth herein, the judgment of the trial court rendered in accord with the jury verdict in favor of the Grefers is amended, in part, to reduce the $ 1 billion award for punitive damages to $ 112,290,000.00 to comply with the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In all other respects, the judgment is affirmed. Furthermore, the trial court judgment denying Exxon's exception of prescription is affirmed.

AMENDED AND, AS AMENDED, AFFIRMED

APPENDIX B

LOUISIANA COURT OF APPEAL OPINION

No. 2002-CA-1237
COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

* * * * *

JOSEPH GREFER, CAMILLE GREFER, ROSE MARIE GREFER HASSI AND HENRY GREFER,

V.

ALPHA TECHNICAL, ET AL.

* * * * *

APPEAL FROM

CIVIL DISTRICT COURT, ORLEANS PARISH

NO. 97-15004, DIVISION "A"

HONORABLE CAROLYN GILL-JEFFERSON, JUDGE

* * * * *

JUDGE LEON A. CANNIZZARO, JR.

* * * * *

(COURT COMPOSED OF JUDGE MICHAEL E. KIRBY, JUDGE MAX N. TOBIAS, JR., AND JUDGE LEON A, CANNIZZARO, JR.)

MARCH 31, 2005

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AMENDED AND, AS AMENDED,

AFFIRMED

The defendants, Exxon Mobil Corporation ("Exxon") and Intracoastal Tubular Services, Inc. ("ITCO"), and the plaintiffs, Joseph Grefer, Camille Grefer, Rose Marie Grefer Haase,[1] and Henry Grefer ("the Grefers"), appeal from a district court judgment rendered in accord with a jury verdict, awarding the Grefers compensatory and punitive damages as a result of the defendants' contaminating their immovable property[2] with radioactive material. Exxon also

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[1] The plaintiffs' original petition refers to Rose Marie Grefer Haase as Rose Marie Grefer Hassi.

[2] The immovable property at issue was part of a larger tract of land purchased by the plaintiffs' great grandfather in 1875 and since then has remained in the Grefer family. The plaintiffs acquired the naked ownership of three-fourths (3/4ths) of

appeals from the district court judgment denying its exception of prescription.

BACKGROUND HISTORY

The operations of most major oil companies are integrated to include exploration and production, refining, and marketing of oil and gas. In the production phase, a well is drilled down to oil bearing sand, casing is cemented in the hole, tubing is run down the hole, and the tubing and casing are perforated at the level of the oil bearing sand to help bring the oil and natural gas to the surface. A section of the tubing is 2 to 3 inches in diameter and 30 feet long. The tubing is screwed together, and depending on the depth of the hole, could involve a string of tubing thousands of feet deep. Pressure underground forces oil and gas through the perforated casing and tubing up to the wellhead at the surface. At that point, separator tanks are used to separate the oil and gas, the oil is piped to a refinery for further processing into gasoline, diesel fuel, jet fuel, etc., and the natural gas is sent to a gas processing plant to separate the various components.

As time goes by, water from underground also mixes with and comes to the surface with the oil and gas. The water usually only appears in mature fields since it is heavier than oil and is generally not "produced" until much of the oil reservoir has become depleted. This water is referred to as "produced water" since it is "produced" up through the well. "Produced water" historically has been

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their father, Archibald J. Grefer, Sr., and full ownership of the entire tract in March 1996 upon the death of their mother, Camille Claire Antoine Grefer.

pumped back into the ground, or discarded in estuaries.

In the early 1900s, the oil industry discovered that the underground water leached certain mineral salts out of the earth's crust and the "produced water" then carried those mineral salts in solution up the tubing toward the surface. As the water came through the perforations and rose up the tubing, the change in pressure and temperature caused those mineral salts to precipitate out of solution and form a scale or crust on the inside of the tubing, and also in the separator tanks at the surface near the wellhead. As scale built up inside the tubing, the production rate of oil and gas slowed down as the flow path became increasingly constricted. When this occurred the oil company extracted the tubing from the well and sent it to a pipe yard where a cleaning contractor mechanically reamed the inside of the tubing to return it to its original diameter.

As early as 1914, the oil companies were aware that the chemical composition of the scale was primarily "barium sulfate." In the 1940s, chemical dictionaries identified "radium sulfate" as commonly being a co-precipitate with "barium sulfate." Several years later, in 1953, in a geological study done for the United States Atomic Energy Commission, radium sulfate was identified as the radioactive scale precipitate in oil field equipment used in southeastern Kansas oil fields. It was then that the oil industry learned that radium sulfate in small percentages was being co-precipitated with the scale's chief components, non-radioactive barium sulfate, strontium sulfate, calcium sulfate, and calcium carbonate.

In July 1971, representatives from Phillips Petroleum Company notified Exxon that it had found low-level radioactive deposits inside production equipment in its gas plants. Thereafter, Exxon undertook an investigation of its own gas plants. During the course of its investigation, Exxon found low-level radioactive deposits in varying amounts inside pumps and compressors in most of the gas plants. Exxon concluded that the source of the radioactivity was a radioactive gas entering the gas plants with the natural gas stream coming from the wellhead. Several years later, in 1977, the oil companies, including Exxon, learned that other radioactive materials had been identified in equipment in a Shell Oil refinery in the United Kingdom ("U.K.").

In 1981, in a routine well logging operation on two Occidental Petroleum Corporation platforms in the North Sea, drillers registered elevated levels of radioactivity from the radioactive scale in equipment on the platforms and the tubing in the well holes. The levels of radiation required Occidental to report the discovery to U.K. governmental authorities. The National Radiological Protection Board ("NRPB"), under contract to the U.K. government, did further testing and identified the radioactive component as radium-226, in the form of radium sulfate, co-precipitated with barium sulfate, calcium sulfate, and strontium sulfate. Radium-226 has a half-life[3] of approximately 1,600 years.

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[3] Half-life is the time required for half of the atoms of a radioactive substance to decay. No two substances have the same half-life. For example, uranium-238 has a half-life of approximately .5 billion years; thorium-234 has a half-life of 24 days; and tellurium has a half-life of 4.2 minutes. Nearly all decay

All major oil companies operating in the North Sea, including Exxon, were immediately made aware of Occidental's discovery through the United Kingdom Offshore Operators Association ("UKOOA"), the oil industry trade association. As a result of the discovery, the U.K. Government held a major conference in 1983 for the oil companies dedicated solely to the NORM[4] problem. In 1985, the UKOOA Safety Committee published NORM safety guidelines and a NORM Reference Manual, which were distributed to all oil companies.[5]

On April 10, 1986, Chevron identified radium-226 in oilfield equipment at a well site near Brookhaven, Mississippi. As a result of Chevron's discovery, Exxon conducted surveys at four Exxon Mississippi well sites in June 1986 and found radium-226 at those sites. Later that month, Exxon representatives met with other oil company representatives at the Alabama/Mississippi Mid-Continent Oil & Gas Association meeting to discuss the radioactive scale problem. Following the meeting, Exxon industrial hygienist, Mr. Lindsay Booher, reported to Mr. M.F. Terrell, a production manager for Exxon's Eastern Division, which covered Louisiana, Mississippi, Ala-

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products are themselves radioactive, giving rise to decay chains that eventually end in a stable nuclide.

[4] "NORM" is the acronym for Naturally Occurring Radioactive Material.

[5] The UKOOA NORM safety guidelines covered the transportation and disposal of contaminated equipment, training of personnel, and the use of qualified and experienced de-scaling contractors. The NORM Reference Manual outlined the systematic approach oil companies were to follow to identify wells with radioactive scale.

bama, and Florida, advising him what he had found. In a letter dated June 19, 1986, Mr. Booher informed Mr. Terrell that where oilfield equipment was opened up for maintenance, inspection, and cleaning, there would be a human health concern, and if equipment contaminated with radioactive scale was turned over to contractors for cleaning, those contractors had to be notified of the presence of radioactivity. ITCO was Exxon's main cleaning contractor. Over the next several months, Exxon prepared a videotape and a letter advising cleaning contractors of the NORM problem and how to manage it.

On March 27, 1987, Exxon representatives met with Mr. John Hooper, president of ITCO, and other ITCO employees, to inform them of the NORM problem. At that time, Exxon played the video and gave them a set of procedural safety guidelines prepared by Mid-Continent Oil & Gas Association to follow when handling NORM contaminated equipment. The focus of the Exxon video and safety procedures was on precautions to prevent workers from breathing or ingesting airborne dust. At that time, Exxon's representatives made no mention of the possible buildup of radioactive scale on ITCO's premises even though it knew the pipe scale had been accumulating on the premises for years and had learned in June 1986 that it was hazardous.

Following the meeting, Mr. Hooper decided that ITCO would not clean any more piping/tubulars that contained NORM, and he informed Exxon of his decision. According to its guidelines, Exxon determined that piping/tubulars with NORM levels reading 5pCi/g (five picoCuries per gram) "above back-

ground"[6] were deemed contaminated.[7] Mr. Hooper then had the Exxon piping/tubulars monitored as they entered the ITCO yard to verify that they were below the 5pCi/g threshold. Piping/tubulars that were above the threshold were segregated to an area in ITCO's lower yard that was leased to Exxon. This area was fenced off and posted. Mr. Hooper also surveyed the piping/tubulars in the pipe racks on the premises to determine if they registered any elevated NORM levels. The piping/tubulars in the racks that had elevated levels of radioactivity were moved to the segregated area. The survey of the ITCO yard, which included the Grefer tract, did not register above background levels with the exception of the two following areas: 1) the ground near an inspection shed outside of the Grefer property, and 2) the ground where the pipe cleaning machine was situated on the Grefer property.

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[6] Under certain conditions, the levels of radiation caused by the radium in scale exceed the normal background levels of radiation from the earth and the sun, to which everyone is exposed.

[7] Three types of radiation measurement acronyms are important to an understanding of this case. The first is microentgens per hour (uR/hr), which is the reading one would get from a geiger-type counter or survey meter, measuring the amount of radiation in the air at any specific point. See, James R. Cox, *Naturally Occurring Radioactive Materials in the Oil Field: Changing the NORM,* 67 Tul. L. R. 1197 (1993), note 6 at 1202. This less thorough measurement may be taken anywhere in the field and is known as an external dose rate. *Id.* The second measurement is picoCuries per gram (pCi/g), which measures the radioactivity of solid media such as soil or scale, and this test must be performed with sophisticated laboratory techniques. *Id.* at 1201. The third measurement is millirems (mR), which concerns the dose of radiation to the body. *Id.* at 1202.

Shortly thereafter, ITCO built a Controlled Environmental Cleaning ("CEC") unit to clean NORM contaminated pipe. The unit had a special dust collection vacuum system, and ITCO demonstrated it for Exxon hygienists and engineers in the summer of 1987. Exxon requested several minor modifications, which ITCO made. However, no one from Exxon ever informed Mr. Hooper that the unit had been approved. Thus, ITCO never used it commercially. Sometime thereafter, ITCO's business began to steadily decline, and Mr. Hooper decided to shut down operations.

FACTS AND PROCEDURAL HISTORY OF THE CASE

ITCO was founded in 1935 as an oil and gas service company. The business was located on Peters Road adjacent to the Harvey Canal in Harvey, Louisiana. Initially, ITCO stored and warehoused oil field production pipe for Humble Oil & Refining Company (a predecessor to Exxon). Eventually, ITCO expanded its services to include the cleaning, inspecting, testing, threading and transporting of pipe for Exxon and other oil companies. To accommodate its expanding operation, in 1968, ITCO began leasing several parcels of adjacent land from Mrs. Camille Antoine Grefer ("Mrs. Grefer"). Between 1968 and 1992, ITCO had leased eight separate tracts of the Grefer property.[8] Beginning in

[8] The Grefer property is a continuous tract of land measuring 1,426,500 square feet, or approximately 33 acres, that runs from 16th Street to Breaux Avenue and from Peters Road to Pailet Avenue in Harvey, Louisiana. The leased tracts are referred to as G-1 through G-4 and G-6 through G-9; there was no G-5 lease.

1984, however, ITCO chose not to renew five of the leases because it had purchased an adjacent 240-acre tract of land for its pipe yard activities.

Due to the decline in business, in June 1992, Mr. Hooper met with Judge Joseph Grefer to discuss terminating ITCO's three remaining leases, G-2, G-3 and G-6. Mr. Hooper informed Judge Grefer that he wanted to cease ITCO's business operations at the end of August 1992. He told Judge Grefer that he would pay the monthly rentals through that date, and asked Judge Grefer if his mother, Mrs. Grefer, would forego the additional three years of rental payments due under the leases. Judge Grefer agreed to recommend this to his mother.

After discussing the matter with her son, Mrs. Grefer agreed to terminate ITCO's remaining leases in exchange for $23,193.51. Mr. Hooper then contacted ITCO's attorney, Daniel Lund,[9] who prepared a "Release, Settlement and Termination Agreement" for the parties to sign. After reviewing the proposed release agreement and finding it insufficient, Judge Grefer spoke to Mr. Lund sometime between June 30 and July 2, 1992, and asked him at that time to insert a clause in the release agreement to reserve the lessor's rights and claims against third parties. Edmond Haase, III, Mrs. Grefer's grandson and a colleague of Mr. Lund, brought the revised release agreement to Judge Grefer and suggested that he call Mr. Hooper about possible radiation on the property. Shortly thereafter, Judge Grefer called Michael Hooper, Mr. Hooper's son, who assured him

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[9] Daniel Lund, P.L.C., is a partner in the Law Offices of Montgomery, Barnett, Brown, Read, Hammond & Mintz.

that an inspection of the property disclosed no radioactive contamination. Based on Michael Hooper's assurances, Judge Grefer approved the revised release agreement and Mrs. Grefer signed it on July 13, 1992. Judge Grefer then returned the signed agreement to Mr. Lund, who forwarded it to Mr. Hooper for his signature. The fully executed agreement was then recorded in the Conveyance Records of Jefferson Parish.

Several years later, in September 1996, an attorney representing a former ITCO employee contacted Judge Grefer, seeking permission to enter the property formerly leased to ITCO to test for radioactive contamination. Judge Grefer allowed the property to be tested and the following month he received the sampling report and laboratory analysis confirming that the property was contaminated with radium.

In August 1997, the Grefers filed suit against Exxon, ITCO, and Alpha Technical Services, Inc. ("Alpha Technical"),[10] among others, alleging that they had recently discovered their property was contaminated with Technologically Enhanced Radioactive Material ("TERM")[11] from scale deposited on

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[10] Alpha Technical, an oilfield service company, also had leased property from the Grefers.

[11] The plaintiffs' use the acronym TERM to refer to the radioactive scale deposits found in the used oilfield tubulars. The defendants, on the other hand, refer to the deposits as NORM. As mentioned, *infra*, the radioactive scale consists of radium-226, radium-228, and their daughter products. To the extent radium is found in used oilfield tubulars, it is naturally occurring and may be technologically enhanced. It is sometimes referred to as Technologically Enhanced Naturally Occurring Radioactive Material ("TENORM"), which is defined as "natural

used oilfield piping/tubulars that were cleaned and/or maintained by ITCO and Alpha for Exxon and other oil companies. They claimed that the defendants knew that the TERM contained hazardous, toxic and carcinogenic substances and was present in both inshore and offshore oil producing wells but never informed the public of the safety hazard. As to Exxon and the other defendants, the plaintiffs asserted causes of action in negligence, strict liability, absolute liability, nuisance, and fraud and sought compensatory damages for loss of use and remediation of the property as well as punitive damages pursuant to La. C.C. art. 2315.3. The plaintiffs also asserted a breach of contract claim against ITCO.

ITCO subsequently filed a cross-claim against Exxon, alleging that pursuant to its contracts with Exxon, Exxon was required to provide ITCO with any pertinent information on any known toxic and hazardous substances contained in its oilfield piping/tubulars. Exxon was also required to meet with ITCO on a regular basis to determine whether any changed condition or specific health or safety hazards would be encountered by ITCO during its pipe cleaning operations. ITCO also alleged that these contracts provided a "Distribution or Risks" between the parties wherein Exxon contractually assumed the risk for its own negligence, willful misconduct, and/or strict liability. ITCO claimed that Exxon sent the majority of its used tubulars from its Eastern and Offshore Divisions to ITCO to clean, and that

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sources of radiation which would not normally appear without some technological activity not expressly designed to produce radiation." LAC33:XV.1417.A.1.

Exxon had knowledge of radioactive scale deposits in some of the piping/tubulars prior to March 27, 1987, the date Exxon first disclosed to ITCO the existence of NORM in the tubulars. ITCO alleged a claim against Exxon for the NORM deposited during ITCO's pipe/tubular operations at ITCO's owned or operated sites based upon Exxon's breach of the health and safety disclosure provisions of the ITCO/Exxon contracts. ITCO further alleged that in the event it would be cast in judgment in favor of the Grefers on the main demand, it would be entitled to full indemnity and/or contribution from Exxon.

Prior to trial, the plaintiffs dismissed all defendants other than ITCO and Exxon. After a five-week trial, the jury returned a verdict in favor of the Grefers and awarded them compensatory damages in the amount of $56,145,000.00, which included $145,000.00 in general damages and $56,000,000.00 in restoration costs (special damages), as well as exemplary (punitive) damages in the amount of $1,000,000,000.00 (one billion dollars). In answers to the jury interrogatories, the jury allocated 85% of the fault to Exxon, 5% to ITCO, 5% to Alpha Technical and 5% to OFS, Inc.[12] The jury also answered special interrogatory number 11 in favor of ITCO, holding that "ITCO is entitled to recover from Exxon all amounts awarded against ITCO under its counterclaim against Exxon[.]" A month after the jury returned its verdict, the trial court held a separate

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[12] ITCO also had filed a third party demand against OFS, Inc. and Oilfield Testers, Inc., alleging that these two licensed NORM handling facilities conducted operations near or adjacent to the Grefer tract that resulted in NORM contamination to the property.

hearing to consider the merits of Exxon's exception of prescription. Following the hearing, the trial court rendered a judgment denying the exception and a judgment in accord with the jury's verdict. It is from these judgments that Exxon, ITCO and the Grefers appeal.

ASSIGNMENTS OF ERROR

Exxon raises the following seven assignments of error on appeal:

1. The trial court erred in denying Exxon's exception of prescription;
2. The trial court judgment is based on an unlawful jury verdict;
3. The trial court erred in refusing to instruct the jury on the Louisiana Department of Environmental Quality ("DEQ") standards governing NORM limits for unrestricted-use land;
4. The trial court erroneously instructed the jury on exemplary damages though the plaintiffs' cause of action accrued before the legislature enacted Louisiana Civil Code article 2315.3;
5. The jury's award of exemplary damages was manifestly erroneous because the evidence does not support a finding that Exxon engaged in wanton or reckless conduct;
6. The jury's punitive damages award is unconstitutional, excessive, and must be vacated or reduced to comport with due process; and
7. The trial court erron usly instructed the jury on ITCO's indemnity claim.

ITCO's single assignment of error is that the jury erred in finding it at fault. The Grefers sole assignment of error is that the trial court erred in refusing to attach prejudgment interest to the jury's punitive damage award.

DISCUSSION

Prescription

Exxon argues on appeal that the plaintiffs' claims had prescribed four years before they filed suit in 1997. Specifically, it argues that Judge Grefer admitted that he had acquired knowledge from his nephew, Mr. Haase, that there might be a problem with radiation on the property during ITCO's negotiations to terminate the three remaining leases and transfer the property back to Mrs. Grefer in 1992. This knowledge, Exxon contends, was sufficient to excite attention, prompt further inquiry, and commence the running of the one-year prescriptive period at that time.

The plaintiffs, on the other hand, contend that Judge Grefer made a reasonable inquiry in 1992 when, at the suggestion of his nephew, he asked Mr. Michael Hopper about the possibility of radiation on the property. Invoking the doctrine of *contra non valentem*, they argue that prescription could not have commenced at that time because Exxon had withheld from ITCO the results of subsurface surveys conducted at the ITCO yard prior to 1992 that disclosed radioactive contamination on the property. Also, the plaintiffs argue that because the radioactive material was hidden randomly, subsurface, they had no way of knowing their property was contaminated until they obtained actual knowledge of the

contamination when Judge Grefer received the results of the radiation study conducted in October 1996.

When damage is caused to immovable property, the one-year prescriptive period commences to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage. La. C.C. art. 3493.

When an exception of prescription is filed, the burden of proof is on the party pleading prescription. *Lima v. Schmidt*, 595 So. 2d 624, 628 (La. 1992). If, however, prescription is evident on the face of the pleadings, then the burden shifts to the plaintiff to show that the cause of action has not prescribed. *Eastin v. Entergy Corporation*, 2003-1030, p. 5 (La. 2/6/04), 865 So. 2d 49, 54.

The rule of prescription is subject to the discovery rule of *contra non valentem agere nulla currit praescriptio*, which suspends the running of prescription during the period in which the cause of action was not known by or reasonably knowable by the plaintiff. *Plaquemines Parish Commission Council v. Delta Development Company, Inc.*, 502 So. 2d 1034 (La. 1987). The Louisiana Supreme Court set forth four instances where *contra non valentem* is applied to prevent the running of prescription: (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting upon the plaintiff's action; (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the

creditor from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though this ignorance is not induced by the defendant. *Id.* at 1054-55. The Court, in *Jordan v. Employee Transfer Corp.*, 509 So. 2d 420 (La. 1987), clarified its application of *contra non valentem*, stating:

> Prescription will not begin to run at the earliest possible indication that a plaintiff may have suffered some wrong. Prescription should not be used to force a person who believes he may have been damaged in some way to rush to file suit against all parties who might have caused that damage. On the other hand, a plaintiff will be responsible to seek out those whom he believes may be responsible for a specific injury.
>
> When prescription begins to run depends on the reasonableness of a plaintiff's action or inaction.

Id., 509 So. 2d at 423. Constructive knowledge or notice sufficient to commence the running of prescription, however, requires more than a mere apprehension that something might be wrong. *Landry v. Blaise, Inc.*, 2002-0822, pp. 5-6 (La. App. 4 Cir. 10/23/02), 829 So. 2d 661, 665-66. Prescription will commence only when the plaintiff knew or should have known by exercising reasonable diligence that tortious conduct occurred and that certain parties are responsible. *Id.* at 666.

At the post-trial prescription hearing, in addition to Judge Grefer's testimony, Exxon introduced into evidence the deposition testimony of Mr. Lund taken on January 9, 2001, and proffered the testimony of Mr. Haase as well as several documents evidencing

Mr. Haase's legal representation of ITCO.[13] Exxon also asked the court to consider an affidavit executed by Mr. Lund.[14]

Judge Grefer testified at the prescription hearing that Mr. Hooper came to him in June 1992 to discuss terminating the leases because he was closing his business. He further testified that his nephew, Mr. Haase, who was representing ITCO at the time, brought him the final document prepared by the Montgomery Barnett law firm to formally terminate the leases and suggested that he contact Michael

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[13] Exxon had subpoenaed both Mr. Haase and Omer F. Kuebel, Jr., another attorney from the Montgomery Barnett law firm, to testify but the trial court quashed the subpoenas because Exxon failed to list them as witnesses on the pre-trial witness list. As a result, Exxon was precluded from calling them as witnesses at the prescription hearing. Nonetheless, the trial court allowed Exxon to proffer statements that it believed Mr. Haase would have testified to if he had been allowed to testify. The proffered testimony provided that Mr. Haase had represented ITCO in several matters during his employment with the Montgomery Barnett law firm, including assisting ITCO in NORM related matters and negotiations with Exxon regarding the remediation of ITCO's upper yard; despite his knowledge of the radioactive contamination on the property, he did not inform his family that it might have contaminated their adjacent land.

[14] Mr. Lund executed an affidavit on November 28, 2000 that ITCO submitted in support of its motion for summary judgment and exception of prescription filed in December 2000. In the affidavit Mr. Lund averred that in 1992 during negotiations with Judge Grefer regarding the cancellation of the ITCO lease, Judge Grefer expressed concern about radiation on the property and asked him to include a reservation of rights clause in the termination agreement. After the trial court denied the motion for summary judgment, ITCO abandoned its exception of prescription.

Hooper to discuss whether there was a problem with radiation on the property. Judge Grefer then called Mr. Michael Hooper, who assured him that he, personally, had inspected the property and found no radiation. According to Judge Grefer, he accepted Mr. Michael Hooper's representation and, based on their families' close business and personal relationship, had no reason to doubt his word. Judge Grefer also acknowledged that he had spoken to Mr. Lund after reviewing an initial draft of the lease termination agreement because he was concerned about reserving his mother's rights against any third parties who might be responsible for damage to the property. However, he testified that he did not recall ever discussing with Mr. Lund his concern about radiation or other environmental damage to the Grefer property.[15] Also, Judge Grefer denied ever visiting the ITCO premises in 1992 to observe the cleaning and

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[15] At a January 3, 2001 deposition, Judge Grefer testified that Mr. Haase told him to call Mr. Michael Hooper because "'there may be a problem with the property.'" When asked whether or not Mr. Haase had told him there was a potential problem with radiation on the property, Judge Grefer replied, "I don't recall." Likewise, when asked whether the word "'radiation'" was ever used in his conversation with Mr. Michael Hooper, Judge Grefer again replied, "I don't recall." At a January 29, 2001 deposition, when questioned by Exxon's counsel about his conversations with Mr. Lund regarding the release for ITCO and whether there was a potential for environmental contamination on his family's property, Judge Grefer stated, unequivocally, "No, I had no conversation with Dan Lund about environmental contamination on the property." Exxon's counsel then asked, "But just to make sure I understand, it's not that you don't recall the conversation? You know you didn't have one?" Judge Grefer again responded, "I didn't have one."

remediation of an area around the pipe-cleaning machine.

Mr. Lund testified at his deposition that he had several phone conversations with Judge Grefer in late June and early July 1992 during which Judge Grefer asked him to include a reservation of rights provision in the release, settlement and termination agreement because he was concerned about radioactive contamination. Mr. Lund told Judge Grefer that ITCO had advised him that they had found an area on the property with a radioactivity reading above acceptable background levels in an area near the pipe cleaning machine; that the machine had been cleaned and that the area around it had been scraped with a bulldozer and the dirt was moved to another site. According to Mr. Lund, Judge Grefer then told him that he had been to the property himself and observed the work being done.[16]

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[16] The exhibits attached to Mr. Lund's deposition included correspondence and notes from Mr. Lund's ITCO file, which the plaintiffs obtained through discovery. Mr. Lund identified two handwritten notations that he had made at the time he spoke to Judge Grefer. The first notation, which appears on a copy of the June 19, 1992 cover letter that Mr. Kuebel wrote to Judge Grefer advising him to review an attached draft of the revised settlement agreement, read "6/30 – Tel Joe – is Holding the Check what about environmental –." Mr. Lund explained that the notation, made on June 30, 1992, indicated that he had telephoned Judge Grefer, who was holding ITCO's check and was inquiring about environmental conditions on the property. The second handwritten notation, Mr. Lund explained, was made during a telephone conversation with Judge Grefer on July 2, 1992 and read "Telephone Joe Grefer, 10:00 a.m., told Joe – says he's concerned about radiation, put in agreement. No indication at this time. This is not intended to release or waive any rights against any party who may have responsibil-

After considering the evidence from the trial and the post-trial prescription hearing, the trial court determined that prescription was not evident on the face of the plaintiffs' petition and that Exxon had the burden of proof but did not satisfy its burden. In reasons for judgment, the trial court stated that she found both Judge Grefer and Mr. (John) Hooper were credible witnesses.[17] She determined that when Mr. Haase informed Judge Grefer of possible contamination in 1992, Judge Grefer made a reasonable inquiry of Mr. Michael Hooper and due to the long-term business and professional relationship between them, Judge Grefer was reasonable to rely upon Mr. Michael Hooper's representations that the

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ity."

[17] Mr. Michael Hooper did not testify at trial but the parties stipulated that had he testified his testimony would have been the same as Mr. John Hooper's testimony. Mr. John Hooper testified at trial that after Exxon disclosed the NORM problem to ITCO in March 1987, ITCO discontinued the cleaning of any used piping/tubulars that were above the safe threshold. He further testified that ITCO surveyed its yard, including the Grefer tract, to determine if there were any elevated NORM readings on site. Piping/tubulars found in pipe racks that had elevated levels of radioactivity were moved to a segregated area in ITCO's lower yard. According to Mr. Hooper, the ITCO yard did not register above background levels with the exception of two areas, one outside an inspection shed and the other where the pipe-cleaning machine was situated on the Grefer property. Mr. Randy Minton, ITCO's radioactive safety officer, reported those areas presented no hazards since the primary safety concern discussed by Exxon with ITCO was the airborne dust which could be ingested by workers. Mr. Hooper testified that ITCO never knowingly cleaned any NORM contaminated pipe after March 27, 1987, and that when he transferred the property back to Mrs. Grefer in mid-1992, he was not aware of any unacceptable levels of radioactive scale on the property.

property had been tested and there was no radioactive contamination. The trial court doubted that Judge Grefer, an attorney and former judge, would have allowed ITCO to terminate the lease three years early and as compensation receive only the rent due through August 1992 and a reservation of rights as to third parties if he had any knowledge of contamination in 1992. She also questioned the veracity of Mr. Lund's testimony that he told Judge Grefer in 1992 that ITCO knew that an area of the property was contaminated. The court opined that Mr. Lund's statement was against his client's (ITCO's) interest and "defied belief."[18]

When findings are based on determinations regarding the credibility of witnesses, the manifest error – clearly wrong standard demands great deference to the trier of fact's findings, for only the fact-finder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989). If the trial court's findings are reasonable in light of

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[18] Mr. Lund initially made the sworn statement in his affidavit in November 2000, which ITCO submitted in support of its motion for summary judgment and exception of prescription. At that time, ITCO was making the same argument that Exxon made at the post-trial prescription hearing and asserts in this appeal, i.e., Judge Grefer knew or should have known by exercising reasonable diligence that the property was contaminated and that the defendants were responsible. Mr. Lund's statement certainly was not against his client's interest; rather it reinforced ITCO's claim that Judge Grefer had knowledge sufficient to commence the running of prescription in July 1992. In any event, whether or not the statement was against ITCO's interest is not germane to the issue at hand.

the record reviewed in its entirety, the court of appeal may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.*

After reviewing the record, we find the trial court was correct in determining that prescription was not evident on the face of the plaintiffs' petition and that Exxon had the burden of proof but did not satisfy its burden by a preponderance of the evidence. Furthermore, we cannot say the trial court was clearly wrong in determining that Judge Grefer acted reasonably in relying on Mr. Michael Hooper's assurances that the Grefer property did not contain unacceptable levels of radioactive waste. The trial court made findings of fact based on her determination that both Judge Grefer and Mr. Hooper were credible witnesses, and her findings, are supported by evidence in the record. Thus, we cannot disturb the trial court's judgment overruling the defendants' exception of prescription.

Unlawful Jury Verdict

In its second assignment of error, Exxon argues that the judgment is based on an unlawful jury verdict, and the trial court reformed the verdict without legal justification. Specifically, Exxon contends that the transcript from the original jury polling disclosed that on interrogatory number 2 (whether Exxon's fault caused damage to the plaintiffs' property) only seven jurors answered, "yes." After reviewing his audiotapes, the court reporter, Mr. Joseph Catalano, amended the transcript to reflect that eight jurors voted "yes" and four voted "no." Mr. Catalano then certified the transcript as being "true and correct."

Exxon subsequently obtained a copy of the certified transcript and discovered the vote tally on interrogatory number 2 was deficient, as only eight "yes" votes were recorded. Exxon notified the court of the deficiency. Meanwhile, the plaintiffs had filed a motion to correct the record pursuant to La. C.C.P. art. 2132 to reflect that juror number three, Mr. Emile Ferbos,[19] voted affirmatively to interrogatory number 2. Nearly a year after the jury rendered the verdict, the trial court granted the plaintiffs' motion and amended the official transcript to reflect that nine jurors had voted affirmatively on interrogatory number 2.

The plaintiffs argue that Exxon cannot contest the trial court's correction of the erroneous jury poll transcript because Exxon failed to make a contemporaneous objection to the vote count on interrogatory number 2 at the time the jury was polled. Also, the plaintiffs point out that the trial court corrected the transcript based upon her recollection of the jury poll and the notes taken by Exxon's counsel at that time, which were consistent with the evidence proffered at the hearing on the motion to correct the record.

Louisiana Code of Civil Procedure article 1797(B) provides, "[i]f trial is by a jury of twelve, nine of the jurors must concur to render a verdict unless the parties stipulate otherwise." Article 2132 of the Code of Civil Procedure provides that a record on appeal which is incorrect or contains misstatements, irregularities or informalities may be corrected by

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[19] The original jury poll transcript of May 22, 2001 refers to Mr. Ferbos as "Mr. Provost" and the amended transcript of May 22, 2001 refers to him as "Mr. Ferbost."

the parties by stipulation, by the trial court or by the order of the appellate court. Furthermore, Code of Civil Procedure article 2088 confers upon the trial court jurisdiction to "correct any misstatement irregularity, informality, or omission of the trial record, as provided in Article 2132."

After the jury's verdict was read in open court, Exxon's counsel requested that the trial court poll the individual jurors as to each interrogatory. The original transcript of the jury poll reflects that initially seven jurors voted "yes" and five jurors, including Mr. Ferbos and Ms. Huyen Bui (juror number 8)[20] voted "no" on jury interrogatory number 2. At completion of the polling, Exxon's counsel informed the court that he had a problem with the vote on jury interrogatory number 9 regarding the cost to restore the plaintiffs' property; only eight jurors had voted "yes." The trial court met with counsel outside the presence of the jury and apparently determined the problem pertained to Ms. Bui's vote. When the trial court returned to the bench, she repeated interrogatory number 9 to Ms. Bui, who responded "yes," giving the plaintiffs' the requisite nine votes on that interrogatory. Exxon's counsel then raised an objection to the inconsistencies in the jurors' responses to interrogatory numbers 12 and 13 even though the plaintiffs had at least nine votes in their favor on

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[20] Ms. Bui is referred to as "Hu Yong Wi" and "Ms. Wei" in the jury polling transcript, the amended transcript and in the trial court judgment correcting the record.

each.[21] No objection, however, was ever made to the vote on interrogatory number 2.

Several months later, after Exxon discovered the deficiency in the certified transcript of the jury poll, the trial court addressed the issue at a hearing on December 21, 2001, stating for the record:

> The court conducted the poll of each individual on each individual case and the numbers, and as the court will recall especially on question number two that it was only juror number two who answered it in the negative as I recall who answered it in the negative on every question.
>
> And when the polling was being done that counsel for the plaintiff specifically stopped the court on a particular question where the number was not correct and the court took corrective action at that time and that should be reflected in the transcript as well.[22]

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[21] Interrogatory numbers 12 and 13 pertained to whether or not Exxon was responsible for punitive damages and, if so, the amount thereof. Ten jurors voted to award the plaintiffs punitive damages but only nine agreed to the one billion dollar amount. The inconsistencies arose because two jurors, Ms. Denise Green and Mrs. Lois Washington, voted to award punitive damages but did not agree with the amount while one juror, Mr. Anthony Green, voted not to award punitive damages yet agreed to the one billion dollar amount.

[22] The record reflects that first, five jurors are recorded as having answered "no" to interrogatory number 2 (not one, as the trial court recollected); second, juror number 2, Ms. Sam, answered "yes" to interrogatory numbers 3,4, 5 and 6 (and not "no" on every question); and third, it was defense counsel (not plaintiffs' counsel) who stopped the court on a particular ques-

The court then allowed the attorneys to question Mr. Catalano about the certified trial transcript. Responding to questions from plaintiffs' counsel, Mr. Catalano stated that he had recently reviewed the audiotape and his contemporaneous stenographic notes of the jury poll and concluded that, while the audiotape was not very clear, his notes reflected that a change should be made in Ms. Bui's response to interrogatory number 2 from "no" to "yes," and that the certified transcript was otherwise correct. He also explained that Mr. Ferbos' vote on interrogatory number 2 was inaudible. The trial court then instructed Mr. Catalano to surrender the original audiotapes to the court for safekeeping and informed the attorneys that they would be allowed to listen to the audiotapes at a later date and that she would entertain motions to technically enhance the tapes if necessary prior to ruling on the issue.

Two months later, the plaintiffs filed a motion to correct the trial record pursuant to La. C.C.P. art. 2132, arguing that because neither the trial judge nor the attorneys present at trial noticed a polling deficiency on interrogatory number 2, it did not occur, and thus, the jury poll transcript should be corrected to reflect nine "yes" votes on interrogatory number 2.

At the hearing on the motion to correct held on April 19, 2002, the trial court allowed the plaintiffs to introduce into evidence the original tape recordings of the trial and the notes made by Exxon's counsel during the jury poll. The plaintiffs then

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tion when the number of votes was not sufficient on interrogatory number 9.

proffered as evidence testimony by Mr. Catalano, a copy of an amended transcript prepared by him, the testimony and affidavit of Mr. Ferbos, and the testimony of both Mr. Scott Newman, an audio production specialist with Evidence Management, and Mr. Jeffrey Talbot, an audio engineer. Exxon proffered testimony by Mr. Leo "Jim" Odom, an electrical engineer specializing in audio production.[23]

In granting the plaintiffs' motion, the trial court relied on her own polling of the jurors and the parties' failure to object to the responses to interrogatory number 2 and found that the official trial transcript, which recorded Mr. Ferbos' answer to interrogatory number 2 as "no," was incorrect. The trial court then rendered judgment, ordering Mr.

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[23] The proffered evidence indicates that Mr. Catalano and Mr. Newman returned to the courtroom on March 18, 2002 to listen to the original tapes, using a Macintosh computer to enhance the sound. The enhanced audiotape disclosed that Mr. Ferbos' answer to interrogatory number 2 was "yes" and Mr. Catalano amended the jury transcript accordingly. Mr. Talbot later obtained an audio file of the original recording from Mr. Newman and, at his request, used a broadband noise reduction computer program to "filter" or eliminate the background noise to better hear the recorded voices. After listening to the original audio file, both filtered and unfiltered, he determined that Mr. Ferbos and Ms. Bui both answered "yes" to the second interrogatory. Mr. Odom, listened to the same audio files using a wave frequency analysis software program and concluded that on interrogatory number 2 there were five "yes" votes, three "no" votes, and the remaining four votes were indistinguishable. In view of the fact that Mr. Catalano had Mr. Newman enhance the original audiotapes without counsel present and Mr. Ferbos' testified nearly a year after the jury was polled, the trial court did not abuse her discretion in excluding the proffered testimony, copy of the amended transcript, and affidavits into evidence.

Catalano to amend the certified transcript of the jury poll to correct the votes cast by Ms. Bui and Mr. Ferbos in response to interrogatory 2 from "no" to "yes" and to file the corrected transcript into the record of the court.

We find the trial court did not err in correcting the record pursuant to La. C.C.P. art. 2132. The notes taken by Exxon's counsel during the jury poll reflect that Ms. Bui voted "no" to interrogatory numbers 3 and 4 only, corroborating Mr. Catalano's testimony from the December 21, 2001 hearing that she had voted affirmatively on interrogatory number 2. As to Mr. Ferbos' responses, Exxon's counsel made no clear notation to indicate his vote on any interrogatory. The fact that counsel failed to indicate a "no" vote for Mr. Ferbos supports the plaintiffs' argument that he did in fact respond "yes" to interrogatory number 2, because the notes record the "no" votes of those jurors who voted "no" on the various interrogatories.

Restoration Damages

In its third assignment of error, Exxon argues that the trial court failed to properly instruct the jury on DEQ standards governing NORM remediation of land for unrestricted use.[24] Specifically, it contends that the trial court should have charged the jury that under DEQ standards land with NORM levels of 5 pCi/g or less above background required no remedial action, i.e., no "restoration." Although the proposed charge referenced exemplary

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[24] The Louisiana limit for unrestricted use of sites containing TENORM is five picocuries per gram (5 pCi/gm) above background of radium-226 or radium-228. LAC33:XV.1417.A.1.

damages, Exxon contends the trial court's failure to give it gave the jury unfettered discretion in awarding restoration damages, and as a result, the jury disregarded evidence that only minimal effort and cost was needed to render the plaintiffs' property completely fit for unrestricted use. Alternatively, Exxon complains that the jury charge included no requirement of "reasonableness." Thus, Exxon contends the $56 million restoration award is unreasonable and manifestly erroneous in view of the evidence that the Grefer property is valued at only $1.5 million. Based on these errors, Exxon requests a *de novo* review.

The plaintiffs counter that Exxon objected to the trial court's refusal to give its proposed jury charge regarding DEQ standards on the basis of exemplary rather than restoration damages, and, therefore, waived its right to appeal the restoration award on the basis of an insufficient jury instruction.

The record reflects that the trial court held a conference on May 10, 2001, at which the parties apparently debated proposed jury charges, but the court reporter verified that the transcript from the conference is missing. The transcript from a conference held on May 18, 2001, the day the jury was charged, nonetheless reflects that Exxon's counsel had asked for a charge limiting restoration damages and objected when it was denied. Thus, Exxon preserved its right to raise the issue on appeal.

La. C.C.P. art. 1792(B) requires the trial court to instruct the jurors on the law applicable to the cause submitted to them. The sufficiency of a jury charge must be determined in light of the charge as a whole.

The court is not required to give the precise instruction submitted by either party, but must give instructions that properly reflect the applicable law in light of the facts of the particular case. Even if the requested instructions are fair statements of the law, the trial court need not include them verbatim but may strike a fair balance so that no one issue is unduly emphasized. *Baxter v. Sonat Offshore Drilling Inc.*, 98-1054, p. 6 (La. App. 1 Cir. 5/14/99), 734 So. 2d 901, 906. Whether to include a requested jury instruction is a matter within the wide discretion of the trial court, and its decision will not be overturned absent an abuse of that discretion. *Wingfield v. State, Dept. of Transportation and Development*, 2001-2668, p. 17 (La. App. 1 Cir. 11/8/02), 835 So. 2d 785, 801. The discovery of an error in the instructions does not by itself justify a *de novo* review. The appellate court must measure the gravity of the error, while considering the instructions as a whole and the circumstances of the case. *Id.* A verdict should not be set aside unless the error in the instructions misled the jury to such an extent so as to prevent it from doing justice. *Id.*; *Baxter*, 98-1054 at p. 6, 734 So. 2d at 906.

Both parties, to some extent, rely on the Louisiana Supreme Court's decision in *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Service Company*, 618 So. 2d 874 (La. 1993). In that case, the U.S. Department of Housing and Urban Development ("HUD") acquired a 13-building apartment complex in 1976 in consideration of the cancellation of a $3.3 million loan. In 1977, HUD entered into an agreement with the Roman Catholic Church for the Archdiocese of New Orleans

("Church") to manage the housing complex in order to provide federally subsidized housing to low-income families; HUD spent $3 million renovating the complex from 1977 through 1980. In 1981, the Church agreed to acquire the complex for $1.7 million, subject to the resolutory condition that if the Church failed to maintain the complex as a facility for low-income families for 15 years, the complex's ownership would revert to HUD. In 1983, a fire destroyed one of the buildings in the complex; the fire was caused by a malfunction in the defendant's (Louisiana Gas Service Company's) gas regulation equipment in the building, which caused a natural gas surge. The defendant acknowledged its fault, thus making the only issue for trial the quantum of damages. The trial court ruled that the Church's recovery was limited to the amount it expended to restore the building to its pre-fire condition less depreciation. The Court ultimately concluded that the expenditure of $232,677.00 for restoration without depreciation of one building was reasonable albeit the Church had paid but $1.7 million for the property and the renovated building had a longer useful life.

The Supreme Court stated that "[t]he single issue presented is whether the lower courts erred in limiting plaintiffs' damages to replacement cost, less depreciation, rather than awarding the plaintiffs the full cost of restoration that had been reasonably incurred." *Id.* at 876. The Court concluded that:

> [A]s a general rule of thumb, when a person sustains property damage due to the fault of another, he is entitled to recover damages including the cost of restoration that has been or may be reasonably incurred, or, at his election, the dif-

ference between the value of the property before and after the harm. **If, however, the cost of restoring the property in its original condition is disproportionate to the value of the property or economically wasteful, unless there is a reason personal to the owner for restoring the original condition or there is a reason to believe that the plaintiff will, in fact, make the repairs, damages are measured only by the difference between the value of the property before and after the harm. Consequently, if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building.**

Id. at 879-80. (Emphasis supplied).

The Court also recognized that damage awards between private litigants for costs of remediation of environmental problems necessarily involve the consideration of the assessments and compliance orders of the DEQ, the primary state agency concerned with environmental protection and regulation. *See, Matter of American Waste and Pollution Control, Co.*, 93-3163 (La. 9/15/94), 642 So. 2d 1258 and *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 452 So. 2d 1152 (La. 1984). The DEQ's actions in protecting the public interest in the environment are governed by a rule of reasonableness that "requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors." *Save Ourselves*, 452 So. 2d at 1157.

As the Second Circuit aptly noted in *Morris & Dickson Co., Inc. v. Jones Brothers Company, Inc.*, 29,379 (La. App. 2 Cir. 4/11/97), 691 So. 2d 882,

> [t]he DEQ's exercise of its role as the public trustee for the protection of the environment results in the development and imposition of a remediation plan [that] determines in large part the measure of damages for the environmental liability affecting a particular property. Apart from this imposed liability as a broad remedy for the public's protection, the actual damages for the private litigants involved in the controversy might not be the same under the conventional measure of damages.

Id. at 17, 691 So. 2d at 892.

In this case, the trial court charged the jury on restoration damages as follows:

> Generally, when a plaintiff sustains damage to property due to the fault of another, he is entitled to recover damages, either the cost of restoration or the difference between the value of the property before and after the harm. However, if the cost of restoring the property to its original condition exceeds the value of the property damages may be measured by the difference between the value of the property before and after the harm. You may award plaintiffs' [sic] the cost to repair and restore the property if you find that plaintiffs intend to repair or restore it. As a general rule, a plaintiff should be put in as good a position as before his property was damaged, but not a superior position.

This jury charge clearly sets forth the law as enunciated in *Roman Catholic Church*, *supra*, but makes no reference to DEQ rules governing the remediation of land for unrestricted use.

The trial court's jury instruction on restoration damages insofar as it followed *Roman Catholic Church* is a correct statement of the law, and when the jury instructions are viewed as a whole, we cannot say that the exclusion of the DEQ standard from the jury charge misled the jury or tainted the verdict. Also, the record contains extensive testimony from environmental experts and documentary evidence pertaining to DEQ NORM regulations on land remediation and Exxon has not shown that the jury ignored this evidence due to the absence of the proposed jury charge in making its award.

Next, we must consider whether the jury's award of $56 million in restoration damages is unreasonable or manifestly erroneous in view of the evidence presented at trial.

The Louisiana Supreme Court in the case of *Corbello v. Iowa Production*, 02-0826 (La. 2/25/03), 850 So. 2d 686, considered the issue of whether the trial court erred in rendering judgment on a jury verdict that awarded the plaintiff $33 million for the defendant's failure to restore property to its original condition even though the land would be worth $108,000.00 in the restored condition. In 1961, the plaintiffs by a written contract leased land to the defendant for the purpose of conducting the defendant's oil and gas related activities. The lease in pertinent part stated:

> Lessee agrees to indemnify and hold lessor harmless from any and all loss, damage, injury and liability of every kind and nature that may be caused by its operations or result from the exercise of the rights or privileges herein granted. **Lessee further agrees that upon termination of this lease it will reasonably restore the premises as nearly as possible to their present condition.** [Emphasis supplied.]

The Court noted that the contract did not limit the defendant's liability for reasonable restoration to the market value of the property. *Id.* at p. 7, 850 So. 2d at 694. Included within the $33 million damage award was $28 million for restoration of the Chicot Aquifer even though the trial testimony established only that the aquifer *might* be contaminated. *Id.* at pp. 12-14, 850 So. 2d at 697-98. Distinguishing *Roman Catholic Church*, *supra*, on the basis that it was a tort suit, the Court held that the contract was the law between the parties that did not limit the defendant's liability for damages. *Id.* at p. 8, 850 So. 2d at 694-95. The Court further held that the contractual obligation to reasonably restore the property was not "tethered" to the market value of the property. *Id.* at p. 6, 850 So. 2d at 693. The Court recognized the right of a party to recover the costs of remediation even though the damaged party could not be forced to use the award to do so. *Id.* at pp. 12-21, 850 So. 2d at 697-701. Citing *Federal Insurance Co. v. Insurance Co. of North America*, 262 La. 509, 263 So. 2d 871 (1972), the Court noted that when one has a contractual relationship with another and claims to have been damaged by the conduct arising out of that contractual relationship, two remedies exist:

one in contract and another tort; the damaged party may elect to recover his damages in either tort or contract. *Corbello*, p. 32, 850 So. 2d at 708. If the damaged party elects to proceed in contract, he waives his right to seek exemplary damages. *Id.* at p. 31, 850 So. 2d at 707. On rehearing by per curiam, the Court specifically emphasized that a party could only recover for actual harm, not potential harm. *Id.* at p. 1, 850 So. 2d at 715.

As to the evidence presented at trial concerning restoration costs, the plaintiffs' expert, Stanley Waligora, a health physicist certified by the American Board of Health Physics and principal health physicist with Environmental Dimensions, Inc., testified that he had extensive experience working under contract with the United States Government on the remediation of radioactive waste sites. Although he did not actually survey the Grefer property, Mr. Waligora visited the site on several occasions. He estimated that it will cost the plaintiffs between $60 million and $82 million to test, collect, contain, transport, and dispose of the radioactive waste on the surface and subsurface of the 32.75-acre property to comply with the DEQ and the United States Environmental Protection Agency ("EPA") regulations. According to his estimate, disposal costs alone would be $58,862,684.00. In reaching his conclusion, Mr. Waligora considered the public's safety and the history of the site, i.e., ITCO had cleaned piping/tubulars on the property for many years. He explained that his cleanup procedure used a "segmented gate system" that was designed by the U.S. Departments of Energy and Defense and has been used by the federal government and private indus-

tries for remediation of similar sites. The plan called for the removal of the first two feet of topsoil throughout the entire Grefer tract. He chose the average depth of two feet for excavation because radiation has been found in some instances as deep as three feet and in other instances as shallow as one foot. The excavated soil would then be processed on site by a machine that scans the soil on a conveyor belt. The clean soil would be separated from the contaminated. Uncontaminated soil would be redeposited on the Grefer tract, and the contaminated soil would be disposed of properly. Mr. Waligora acknowledged that his remediation plan was not based solely on the DEQ standard for remediation of NORM contaminated property for unrestricted use and that his estimated cost of remediation greatly exceeded the $1.5 million value of the property in an unrestricted use state. He further explained, however, that a remediation under DEQ standards requires that property be cleaned to a level sufficient to prevent public exposures in excess of 25 millirems per year, yet a soil reading of 5 pCi/g above background may still emit dangerous levels of radiation in excess of 200 millirems per year. Mr. Waligora testified that the standard of no more than 1 pCi/g above background meets DEQ, Nuclear Regulatory Commission ("NRC") and EPA dose standards and is reasonably achievable and protective of the public health.

Exxon's expert, Mr. Mark Krohn, a certified radiation protection technologist with American Radiation Service ("ARS"), testified that he performed a gamma exposure rate screening survey of the Grefer tract in June 2000 and identified five areas of the

property with gamma exposure rates equal to or greater than twice background levels. He returned in August 2000 to conduct a detailed 100% gamma exposure rate survey and sampling evolution to a depth of 12 inches on those five areas and found one area that contained a sealed radium-226 source. Once the sealed source was removed gamma exposure rates returned to normal background levels. In February and March 2001, ARS conducted two separate 100% gamma exposure rate surface scans of areas of the tract that were not surveyed earlier. At that time, ARS also did a detailed sub-surface survey and sampling evolution on the entire Grefer tract to confirm the absence or presence of sub-surface NORM. Mr. Krohn testified that the ARS survey indicated five small areas measuring a total of 11,518 square feet or 0.8 percent (0.8%) of the Grefer tract contained radium-226 activity levels greater than 5 pCi/gm above background, and under DEQ NORM regulations these were the only areas on the property that required remediation. Based on the ARS survey results, he opined that 99.2 percent of the property may be put to unrestricted use. Mr. Krohn emphasized that to bring the Grefer tract into compliance with DEQ regulations entailed removing the top six inches of soil. He estimated that remediation and disposal costs to release the Grefer property to unrestricted use in accordance with DEQ regulations was approximately $46,000.00. On cross-examination, Mr. Krohn acknowledged that for remediation purposes DEQ standards require the property be cleaned to prevent public exposures in excess of 25 millirems per year of radiation yet conceded that he had not done any calculations to de-

termine the amount of radiation emitted from a soil reading of 5pCi/g above background.

The record also reflects that in the early stages of the litigation, the plaintiffs had retained the professional services of Mr. Edwin M. Cargill, a health physicist from Radiation Protection Resources, and had listed him as an expert witness for trial. At the request of plaintiffs' counsel, Mr. Cargill surveyed the Grefer property to determine the amount, if any, and location of radioactive material on the premises. In conjunction with his survey, Mr. Cargill prepared a preliminary report dated November 13, 1999, that indicated the presence of TERM on several areas of the property and estimated that the cost to remediate and restore the property for unrestricted use at $1,387,310.00. However, Mr. Cargill noted in the preliminary report that the survey results and estimated costs could change "because of the possibility that buried waste was not detected and also due to the heavily wooded state of the property, making [the] survey difficult."

The plaintiffs neither called Mr. Cargill to testify at trial nor introduced into evidence his survey and preliminary report. Exxon, however, did admit the survey results and preliminary report into evidence during the direct examination of Mr. Krohn to demonstrate that Mr. Waligora's estimate between $60 million and $80 million was clearly unreasonable. Mr. Krohn testified that although he disagreed with Mr. Cargill's remediation estimate, he did consider his survey and report in conducting the ARS survey. In contrast, Mr. Waligora, acknowledged that he had worked closely with Mr. Cargill on several remediation projects and in other litigation and that he re-

spected his opinion, but he thought Mr. Cargill's survey results were not accurate and his remediation estimate too low because they failed to consider the full extent of the subsurface contamination on the Grefer tract.

Unlike *Corbello*, the Grefers and ITCO had a contract between them that did not require the land to be restored to its original state at the end of the contract. Further, the Grefers elected to proceed per *Federal Ins. Co. v. Insurance Co. of North America*, *supra*, in tort, not contract, and to exercise their right to seek exemplary damages under the now former La. C.C. art. 2315.3. Thus, *Roman Catholic Church* governs that which the Grefers may recover from Exxon and ITCO.

In determining damages, the trier of fact is accorded much discretion. La. C.C. art. 2324.1. On appeal, consideration of the jury's determination of damages is limited to a review for manifest error or abuse of discretion. *Wingfield*, *supra*, 2001-2668 at p. 27, 835 So. 2d at 806. In determining the amount of damages, the discretion vested in the trier of fact is "great." *Youn v. Maritime Overseas Corp.*, 623 So. 2d 1257, 1261 (La. 1993), *cert. denied*, *Maritime Overseas Corp. v. Youn*, 510 U.S. 1114, 114 S. Ct. 1059, 127 L. Ed. 2d 379 (1994). Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. *Rosell v. ESCO*, *supra* at 844. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. *Id.*

In this particular case, the jury's award of $56 million for restoration damages for a tract of land whose highest market value is $1.5 million certainly appears unreasonable. Nonetheless, the Supreme Court in *Corbello* affirmed an award for millions of dollars of damages for a water aquifer where no evidence was presented that the aquifer beneath the Corbello property was in fact damaged by contamination from the defendant's operations and it was questionable as to the right of Corbello to recover those alleged damages. When we compare that to the language in *Roman Catholic Church* that requires the award of **reasonable** damages in a tort case, which rarely may exceed the fair market value of the property, we cannot conclude that the $56 million award in this case is unreasonable.

The jury was presented with evidence from experts estimating the cost to remediate the Grefer property ranged from $46,000.00 to $82 million dollars, with $1,387,310.00 being the closest estimate to the market value of the property. Although Mr. Waligora's estimate of $60 million to $82 million was based not on DEQ's standard for remediation of NORM contaminated property for unrestricted use, but rather on more stringent guidelines set by the EPA and Nuclear Regulatory Commission ("NRC"), the evidence reflects DEQ's regulations were considered in his remediation plan. Still, the jury's restoration award was $4 million less than Mr. Waligora's lowest estimate.

We also emphasize Judge Grefer's testimony that he and his siblings want to restore the property, which has been in the Grefer family since 1875, to its original condition and not to the mere minimum

DEQ standard. He explained that they are unable to sell or lease the contaminated property without exposing themselves to liability and they do not want to burden their children with this. Judge Grefer also expressed grave concern about the effects the radioactive contamination might have on the neighbors and the general public. Clearly, the plaintiffs had both personal and economic reasons for wanting to restore their property to its original condition. Pursuant to the rule set forth in *Roman Catholic Church, supra*, they may elect to do so. After a review of the record, we cannot say the jurors abused their discretion or manifestly erred in making the $56 million award. Thus, we will not disturb the jury award on restoration damages.

Applicability of Louisiana Civil Code Article 2315.3

In this assignment of error, Exxon asserts that the jury's award of exemplary damages must be vacated because the plaintiffs' cause of action accrued before La. C.C. art. 2315.3 was enacted. Specifically, Exxon contends that the plaintiffs' cause of action accrued when their property first sustained the "slightest" damage, i.e., sometime in the 1960s when ITCO began cleaning NORM scale from Exxon's used oilfield equipment on Grefer property. Because the plaintiffs' cause of action accrued before 1984, and article 2315.3 cannot be applied retroactively under *Anderson v. Avondale Industries, Inc.*, 2000-2799, p. 3 (La. 10/16/01), 798 So. 2d 93, 97, Exxon asserts the plaintiffs are precluded from recovering exemplary damages.

Former La. Civil Code article 2315.3 was enacted in 1984 and later was repealed by La. Acts 1996, 1st Ex. Sess., No. 2, § 1, effective April 16, 1996. The former article provided, in pertinent part:

> In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances.

In support of its argument that article 2315.3 is inapplicable because the plaintiffs' cause of action accrued prior to its enactment, Exxon relies on the cases of *Champagne v. Celotex*, 599 So. 2d 1086 (La. 1992) and *Bulot v. Intracoastal Tubulars Services, Inc.*, 98-2105, p. 1 (La. App. 4 Cir. 2/24/99), 730 So. 2d 1012. In *Champagne*, the Supreme Court considered whether to apply pre-comparative fault law to tort claims filed by employees injured by long-term asbestos exposure. Finding that all of the employees were injured by long-term asbestos exposure before the 1979 comparative fault law was enacted, the Court held that the pre-comparative fault mechanism for allocating liability applied even though the employees alleged that some exposure occurred *after* the comparative fault law went into effect. *Id.* at 1088.

In *Bulot v. Intracoastal Tubulars Services, Inc.*, 98-2105, pp. 4-8 (La. App. 4 Cir. 2/24/99), 730 So. 2d 1012, 1015-16, a personal injury case also involving the Grefer property and ITCO's operations, several former ITCO employees and the survivors of deceased employees filed suit against Exxon and others

for injuries caused by occupational exposure to TERM scale and other toxic materials. The issue before us was whether the plaintiffs could recover exemplary damages if they or the decedents worked for ITCO prior to the enactment of La. C.C. art. 2315.3 in 1984. We held that the La. C.C. art. 2315.3 did not apply to claims filed by the living employees, or to the survival claims filed by the survivors of the deceased employees, but that it did apply to the wrongful death claims of the survivors of those former employees who died while La. C.C. art. 2315.3 was in effect.

On remand from the Supreme Court in *Bulot v. Intracoastal Tubulars Services, Inc.*, 98-2105, p. 1 (La. App. 4 Cir. 5/17/00), 761 So. 2d 799, we had to reconsider our decision in view of the Supreme Court's recent holding in *Walls v. American Optical Corp.*, 98-0455 (La. 9/8/99), 740 So. 2d 1262.[25] We again concluded that the application of La. C.C. art. 2315.3 to survival actions is triggered by the date of exposure, citing *Cole v. Celotex Corp.*, 599 So. 2d 1058 (La. 1992). As to the wrongful death claims,

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[25] In *Walls*, the Supreme Court addressed the issue of whether the Workers' Compensation Act, specifically La. R.S. 23:1032 as amended in 1976, which extends tort immunity to executive officers, barred a wrongful death action against the executive officers when the decedent's occupational exposures occurred entirely before the statute was amended, but the death from silicosis did not occur until years after the amendment's effective date. The Court held that applying the 1976 amendment to silicosis exposure that predated the statute, resulting in death after the effective date of the statute, did not result in an impermissible retroactive application of the law.

based on the Court's holding in *Walls*, we concluded that La. C.C. art. 2315.3 was applicable because the cause of action arose after the effective date of the amendment, noting that the law in effect at the time of death is the law that applies to a wrongful death action. Thus, the plaintiffs could seek exemplary damages in their wrongful death claims even though the decedents' exposure occurred prior to the enactment of article 2315.3 in 1984. *Bulot*, 98-2105 at p. 2, 761 So. 2d at 800-01.

Thereafter, the *Supreme Court in Bulot v. Intracoastal Tubular Services, Inc.*, 2000-2161 (La. 11/13/00), 773 So. 2d 152, granted a writ intending to address whether the application of La. C.C. art. 2315.3 to conduct arising prior to its effective date would be an improper retroactive application of the article under *Walls*. However, in reviewing the record, the Court determined that the plaintiffs had alleged each of the decedents had some exposure to hazardous substances after the effective date of La. C.C. art. 2315.3. Because the case was before the Court on an exception of no cause of action and the plaintiffs pled a cause of action for punitive damages arising from post-1984 conduct, the Court recalled the writ, stating that, "we express no opinion as to whether plaintiffs could recover punitive damages for pre-1984 conduct." *Bulot v. Intracoastal Tubular Services, Inc.*, 2000-2161, p. 2 (La. 2/9/01), 778 So. 2d 583, 584 n.4.

Thus, for the purpose of determining when La. C.C. art. 2315.3 applies, the relevant time period is the time the injury occurs. In *Quick v. Murphy Oil Co.*, 446 So. 2d 775, 780 (La. App. 4th Cir.1984), we stated:

> We do distinguish, however, the time when a cause of action arises from when prescription begins to run. A cause of action arises when injury occurs, while prescription begins to run only when the injured party becomes aware of his injury.

Unlike *Champagne* and *Bulot*, which involved latent disease injuries, the contamination to the plaintiffs' land occurred as the result of Exxon's conduct over a period of several years. Indeed, the build up of NORM scale deposits on the surface and subsurface of the Grefer property occurred gradually during years of cleaning pipe on the premises. It is well settled that when a tort involves continuing injury, the cause of action accrues at the time the tortious conduct ceases. *In re Med. Rev. Panel of Moses*, 2000-2643, p. 16 (La. 5/25/01), 788 So. 2d 1173, 1183. Since no single incident in the continuous chain of tortious activity can be identified as the cause of significant harm, courts have held it proper to regard the cumulative effect of the conduct as actionable. *Id.* at p. 20, 788 So. 2d at 1185.

The evidence in the record indicates that radioactive scale was discharged from the used oilfield pipes from the 1960s through 1992 when ITCO terminated its lease. The discharged scale was dumped, buried, and utilized throughout the yard as road fill and surface material. In time, radioactive contamination resulting from the NORM scale deposits was found in varying degrees throughout the Grefer tract. The record also indicates that in March 1987, ITCO first learned that Exxon's used oilfield piping/tubulars contained NORM, and it no longer cleaned NORM contaminated pipes after that date. If we were to

accept Exxon's argument that the plaintiffs' cause of action accrued when ITCO began cleaning Exxon's NORM contaminated oilfield pipe in the 1960s, we would effectively excuse any punitive conduct that occurred after the enactment of La. C.C. art. 2315.3, provided it was a continuation of pre-enactment misconduct. We do not believe this was the intent of the Louisiana legislature in enacting the statute. Thus, for purposes of determining the applicability of La. C.C. art. 2315.3, we find the plaintiffs' cause of action accrued in March 1987, when ITCO stopped cleaning Exxon's NORM contaminated pipe on the Grefer land. After that date, any piping/tubulars with NORM levels reading 5pCi/g or higher above background were segregated to that portion of ITCO's property leased to Exxon.

Conduct Under Louisiana Civil Code Article 2315.3

In its fifth assignment of error, Exxon argues that the jury's award of exemplary damages must be vacated because the record does not support a finding that Exxon engaged in wanton or reckless conduct. Exxon contends the La. C.C. art. 2315.3 required the plaintiffs to prove that it sent NORM-contaminated oilfield tubing to ITCO for cleaning even though it knew public safety was at risk, or that it should have known that it was "highly probable" that its conduct would harm the public. In other words, Exxon's state of mind had to be one of "conscious indifference to the consequences, amounting almost to a willingness that harm should follow." *Griffin v. Tenneco Oil Co.*, 531 So. 2d 498, 501 (La. App. 4th Cir. 1988). Exxon further argues that no reasonable juror could have concluded that Exxon

acted with the quasi-criminal intent article 2315.3 required. *See Oubre v. Union Carbide Corp.*, 99-0063, p. 22 (La. App. 5th Cir. 12/15/99), 747 So. 2d 212, 227.

In contrast, the plaintiffs argue that they presented sufficient evidence at trial to allow a reasonable person to conclude: (1) that Exxon acquired specific knowledge of the dangers of the radioactive waste in its oil production and specific knowledge of the procedures to protect against those dangers in 1985; (2) that Exxon never adequately warned ITCO of the danger; (3) that Exxon withheld information from the Grefers; (4) that Exxon failed to take any steps to prevent further contamination until 1987; and (5) that Exxon's preventative measures were inadequate.

The statute providing for exemplary damages for wanton and reckless disregard for public safety in storage, handling or transportation of hazardous or toxic substances must be strictly construed, as it imposes a penalty. *Bonnette v. Conoco, Inc.*, 2001-2767, p. 27 (La. 1/28/03), 837 So. 2d 1219, 1236-37. To obtain an award of exemplary or punitive damages under La. C.C. art. 2315.3, the plaintiff must prove: (1) that the defendant's conduct was wanton and reckless by proving that "the defendant proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position," or that the defendant engaged in "highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent;" (2) that the danger created by the defendant's wanton or reckless conduct threatened or endangered public safety; (3)

that the defendant's wanton or reckless conduct occurred in the storage, handling or transportation of hazardous or toxic substances; and (4) that the plaintiff's injury was caused by the defendant's wanton or reckless conduct. *Id.*; *Billiot v. B.P. Oil Co.*, 93-1118, pp. 16-17 (La. 9/29/94), 645 So. 2d 604, 613.

Our review of the record discloses sufficient evidence to support the jury's finding that Exxon engaged in wanton and reckless conduct. Exxon first learned of NORM contamination in oilfield drilling equipment in 1981, when Occidental Petroleum discovered it on its platforms in the North Sea. At that time, Dr. Andrew Lloyd Smith, a Scottish environmental consultant, was working for Occidental Petroleum in the U.K., and following the discovery, was a member of the United Kingdom Offshore Operators Association (UKOOA) Safety Committee that drafted and published the UKOOA safety guidelines and Reference Manual that were given to all oil companies operating in the North Sea. ITCO offered Dr. Smith as a health and safety expert witness at trial. According to Dr. Smith, the reference manual was extensive and covered both the identification of radioactive scale and the procedure to follow up on such identification. The guidelines, promulgated by the oil and gas industry and approved by the National Radiological Protection Board ("NRPB"), recommended the specific steps to minimize or eliminate the effect of NORM on public health and the environment. Dr. Smith conceded that the UKOOA reference manual was devoted exclusively to NORM scale accumulating in the North Sea and, for all the industry knew, the NORM phenomena was peculiar to oil production in that area.

Though Exxon was abreast of the problem, it took no action to survey its wells elsewhere. The depositions of Mr. John Rullman, Director of Exxon's Eastern Division Environmental and Regulatory Affairs, and that of Mr. Everett C. Hutchinson, Exxon's Assistant Director of Environmental and Regulatory Affairs, were introduced into evidence and read to the jury at trial. Mr. Rullman testified that he had obtained a copy of the UKOOA safety guidelines and found they were very onerous, restrictive, and inflexible. He also admitted that he was not sure if at that time Exxon had the same problem in the U.S. Mr. Hutchinson, too, believed the UKOOA guidelines were unreasonable for Exxon's production operations in the U.S. Mr. Booher, Exxon's industrial hygienist, admitted that if Exxon had surveyed its wells prior to the Chevron discovery in the U.S. in 1986, then it would have discovered radium in its wellheads much sooner.

In May 1986, after learning of Chevron's NORM discovery in Mississippi, Exxon surveyed its Mississippi well sites and found radiation accumulation in its equipment. Twice Exxon officials were notified that the cleaning contractors had to be informed of the radioactivity, as it posed a health and safety hazard, but they still did nothing to warn them.

The evidence further reflects that by August 1986 Exxon was clearly worried about governmental regulation and losing the produced water exemption, which allowed it to dispose of the by-product in an unregulated manner. A memo written on August 28, 1986, by Mr. Howard Collier, Exxon's director of Environmental and Regulatory Affairs, stated, "Chevron has taken a very high profile approach to han-

dling their discovery of radiation in Mississippi and many agencies are now involved." Mr. Collier expressed an interest in "[getting] the industry and the regulatory agencies to slow down." Then he admitted,

> Chevron's discovery is nothing new. After all, if there wasn't some radiation in down-hole formations, it would be difficult to run a gamma ray log. My primary concern is the current investigation and analysis not unduly influence the EPA who is in the process of deciding under RCRA [Resource Conservation Recovery Act] whether produced water should be classified as a hazardous waste and handled as such.

Mr. Booher's notes taken from comments made by Mr. Collier at an Exxon NORM meeting in Houston on January 8, 1987, indicate the cost of losing the RCRA exemption for produced water as $750 million in the first year and $150 million for each year thereafter. At that same meeting, several Exxon officials concluded that notifying the cleaning contractors would be "premature."

Exxon was also concerned about litigation arising from the NORM discovery in Mississippi. Street, Inc., a pipe yard company in Mississippi, had filed suit against Chevron and other oil companies (not Exxon), for $35 million, claiming negligence for failure to advise that pipe delivered to it was contaminated with radioactive material. Mr. Hutchinson, in an internal memo copied to Mr. Rullman, recognized the possible "need to manage the disposal of large accumulations of contaminated scale, such as could occur at a pipe yard." Mr. Rullman, in a confidential

memo dated October 14, 1986, noted ITCO was a potential "look alike" to Street, Inc., and stated, "If potential exists for radioactive material accumulation, perform low key radiation exposure measurements;" "Coordinate ITCO plan with Eastern Division;" and "Consider advisory letter to ITCO with Headquarters involvement." Still, Exxon did nothing to notify ITCO.

Eventually, Exxon sent the letter notifying the cleaning contractors of the NORM problem in March 1987, ten months after it had identified the problem at its domestic well sites. Even then Exxon downplayed the hazard, as evidenced by Exxon's meeting with ITCO. According to Mr. John Hooper, Exxon's videotape made the health risks associated with NORM scale sound minor and the safety procedure guidelines merely suggested taking precautions to avoid breathing or ingesting airborne dust.

Exxon maintains that no reasonable juror could have concluded that it knew about the NORM buildup in domestic oil production tubing before 1986. We disagree. Although the 1981 discovery of NORM inside drilling equipment was limited to the North Sea area, by that time Exxon knew that Shell Oil had found radioactive material in equipment at a refinery in the U.K. The knowledge that radioactive material had been found in both drilling and refining equipment in that region of the world coupled with the fact that just a few years earlier Exxon discovered radioactive deposits inside equipment at several Texas gas plants, and concluded the source was radon-222 entering the plants with the natural gas stream coming from the wellhead, the jury could have concluded that Exxon knew or should have

known of the likelihood of NORM contamination in domestic oilfield production equipment before Chevron's Mississippi discovery in 1986. Considering the integrated nature of Exxon's operations, such a conclusion is reasonable. Also, in view of Mr. Collier's August 28, 1986 memo, stating, "Chevron's discovery is nothing new," the jury reasonably could have concluded that Exxon knew about the NORM deposits in its domestic oilfield equipment before 1986, and its failure to act sooner was wanton and reckless.

Exxon contends, too, that it acted to protect the public safety after Chevron's 1986 NORM discovery. Exxon emphasizes that after the discovery it conducted a nationwide NORM survey of all its facilities; it began screening used tubing for NORM at production sites and the contaminated tubing was stored – not cleaned; it began to screen tubing at central storage facilities like ITCO; it recommended safety procedures; and it began to develop a new cleaning process that would allow for the previously-stockpiled, NORM contaminated tubulars to be cleaned safely.

We find no merit to Exxon's argument. Clearly, the evidence reflects that the action taken by Exxon after the Chevron discovery was to benefit Exxon, not the general public. As a result of the discovery, Exxon was faced with unprecedented environmental, legal, economic, and financial challenges. It had no choice but to act. In any event, we find Exxon's most egregious act was failing to notify ITCO of the NORM hazard immediately after it tested the Exxon Mississippi wells and discovered NORM at the well sites. Although Exxon's representatives claimed that to notify the cleaning contractors immediately

would have been "premature" until they knew the extent of the problem and they did not want to "alarm" the public, their failure to do so is inexcusable. Exxon executives had been warned that NORM posed a human safety hazard to anyone exposed to it, but they waited nine months to send the warning letter to the contractors and to meet with ITCO. Exxon's delay in notifying ITCO of the danger was wanton and reckless. After all, the ITCO employees were the persons handling the NORM contaminated piping/tubulars on a daily basis and were most at risk, not Exxon's executives.

Upholding the jury's finding that punitive damages are warranted in this case, we turn now to consider whether the jury's one billion dollar award is constitutional.

Constitutionality of Punitive Damage Award

In this assignment of error, Exxon asserts that the $1 billion punitive damage award is unconstitutional as it violates Exxon's Fourteenth Amendment right to due process of law.

In recent years, the U.S. Supreme Court has considered several cases raising exemplary damage issues. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), the Court ruled that exemplary damage awards that are "grossly excessive" violate the Due Process Clause of the Fourteenth Amendment. The Court then provided three "guideposts" for gauging when an exemplary damage award crosses the constitutional line: (1) the reprehensibility of the defendant's conduct; (2) the ratio between the exemplary damage award and the harm the defendant's conduct caused,

or could have caused; and (3) the size of any civil or criminal penalties that could be imposed for comparable misconduct.

The constitutional constraints on the amount of exemplary awards were again considered in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001), wherein the Court ruled that state and federal appellate courts must conduct a *de novo* review of exemplary damage awards challenged as being grossly excessive under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Cooper*, 532 U.S. at 433-434, 121 S. Ct. at 1685-1686. In mandating a *de novo* review, the Court reasoned that "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." *Id.* at 437, 121 S. Ct. at 1686.

More recently, in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) the Court further tightened the permissible limits of exemplary awards, holding that appellate "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.*, 538 U.S. at 426, 123 S. Ct. at 1524.

Keeping in mind the principles outlined in *BMW of North America, Inc., v. Gore*, the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, our *de novo* review of the jury's exemplary damage award follows.

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, *supra*, at 575, 116 S. Ct. 1589. In determining the reprehensibility of a defendant, courts are instructed to consider whether: the harm caused was physical as opposed to economic; the tortuous conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. 517 U.S. at 576-577, 116 S. Ct. 1589. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should be awarded only if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.* at 575, 116 S. Ct. at 1589.

In this case, it is undisputed that the plaintiffs suffered strictly economic harm, i.e., property damage. While Exxon's conduct resulted in no physical harm to them, it certainly evinced an indifference to or reckless disregard of the health and safety of others. As stated above, Exxon's nine-month delay in notifying ITCO and the other cleaning contractors of the dangers posed from handling NORM contaminated equipment certainly put their employees at risk. Even though ITCO no longer cleaned NORM

contaminated piping/tubulars after March 1987, Exxon was well aware that NORM contaminated equipment remained stockpiled on ITCO's property. This posed a health hazard to those on the premises.

We also find that the target of the conduct was financially vulnerable. ITCO had leased the property from the Grefer family for many years and during that period operated a very successful business cleaning oilfield equipment. After Exxon discovered the NORM contamination in its drilling equipment and finally realized the extent of the problem, the oil company sought to wipe its hands clean and leave ITCO with the mess. Notably, on April 19, 1989, Mr. Rullman sent a memo to Mr. Roger Koerner, Exxon's top manager for the Eastern Division, regarding "ITCO Contract Recommendations." The memo stated in part:

> RAE [Exxon's Regulatory Affairs Engineering] concurs with the suggestion to screen other contractors to ascertain their abilities to decontaminate NORM material, . . . The development of alternative cleaning/disposal options would help soften their stance [on contract negotiations] and may be needed anyway if the ITCO procedure does not provide sufficient cleaning. The continued use of the ITCO yard could complicate any potential personal injury liability claims since it would be difficult to determine when the exposure occurred that caused the injury. Resuming cleaning with a new contractor would clearly establish the earliest date of potential exposure, and Exxon could better contractually minimize its exposure with the new contractor. This would

not, however, help Exxon with any claims from past activities at ITCO.

Shortly thereafter, ITCO's business steadily declined while Exxon sent its used oilfield equipment to new cleaning contractors. After ITCO ceased operations, terminated its lease and vacated the premises, Exxon's NORM scale remained on the premises. In addition to ITCO's failure, the Grefers are now financially burdened with the task of remediating the property.

Furthermore, we find Exxon's repeated conduct from 1985 through 1992, when ITCO finally shut down, did involve an element of deceit. Again, as mentioned above, from June 1986 to March 1987 Exxon officials intentionally withheld information regarding NORM contamination in the piping/tubulars even though they knew the scale posed a direct danger to the physical health and safety of those workers who continued to handle the NORM contaminated equipment on a daily basis. Also, after learning of the danger posed by the NORM contaminated scale, Exxon took no step to remove the radioactive material from ITCO's premises. In our opinion, Exxon's conduct was reprehensible.

Next we consider the second Gore guideline, the disparity between actual or potential harm suffered by the plaintiff and the punitive damage award. For potential harm properly to enter into the ratio, it must be directly attributable to the misconduct and not to lawful or unrelated causes. *See Cooper Industries*, 532 U.S. at 441, 121 S. Ct. at 1688.

In *Campbell*, the Utah Supreme Court justified a punitive award of $145 million in a case in which the

plaintiff was awarded $1 million in compensatory damages for State Farm's bad-faith failure to settle, fraud, and intentional infliction of emotional distress. On appeal, the U.S. Supreme Court considered the award under the *Gore* guideposts and concluded that the award was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. *Campbell*, 538 U.S. at 429, 123 S. Ct. at 1526. While the Court declined to impose a bright-line ratio which punitive damages cannot exceed, it noted that its jurisprudence and the principles set forth therein demonstrate that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. The Court recognized that although "there are no rigid benchmarks," a higher ratio could be justified only if "a particularly egregious act has resulted in only a small amount of economic damages." *Id.*, 538 U.S. at 425, 123 S. Ct. at 1524. The Court also noted that the converse is true, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* The Court found the compensatory award of $1 million was "substantial," and concluded that the *Gore* guideposts "would [only] justify a punitive damages award at or near the amount of compensatory damages." *Id.*, 538 U.S. at 429, 123 S. Ct. at 1526. The Court also rejected the Utah Supreme Court's reference to State Farm's enormous wealth to justify the award, stating, "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id.*, 538 U.S. at 427, 123 S. Ct. at 1525.

This case leaves little doubt that there is a presumption against an award that has an 18 to 1 ratio. In our opinion, the compensatory award in this case was substantial; the Grefers were awarded $56,145,000.00 for a piece of property worth at most $1,500,000.00. Although the plaintiffs claimed only property damage, and no physical harm, the trial court allowed the plaintiffs to argue and present substantial evidence, over Exxon's objections, of the potential and/or alleged actual harm to other persons who were not parties to this suit and whose claims were not before the jury. For example, in their opening statement, the plaintiffs' counsel referred to the "community" and "churches immediately next to" the Grefer property. He described radium particles in "a very, very, very fine powder" being blown "all over the place." A video was shown to the jury that depicted elementary school children getting on and off a bus. Witnesses were then asked questions designed to foment the fear of a radium dust cloud blowing over houses, churches, and schools near the Grefer property. The trial court also allowed plaintiffs' counsel to question witnesses about the potential harm of radiation to children and unborn children even though this case is strictly a claim for damage to immovable property. Likewise, the trial court allowed plaintiff, Rose Grefer Haase, a former nurse, to testify regarding the effects of x-ray radiation and the protections taken by those working with x-ray machines to avoid personal injury. The trial ended with a neighbor, Ms. Thelma Benjamin, testifying on rebuttal about the DEQ and Exxon failing to test her property or the property of others in the neighborhood. Plaintiffs' counsel likened the harm suffered by the Grefers with damages

caused in the 1989 EXXON-VALDEZ oil spill. Much of this evidence was irrelevant and, more than likely, confused the jury, contributing to its exorbitant punitive damage award.[26]

The plaintiffs also put on substantial evidence regarding Exxon's wealth. The jury heard that Exxon is the largest corporation in the world and had assets of $251 billion; that its revenue for the year 2000 was $228.439 billion; and that its total net worth in 2000 was $173 billion. In addition, evidence was presented of the salaries, bonuses, stock options, etc., of Exxon's corporate executives. The jury heard that the only way to punish a big corporation like Exxon for its reprehensible behavior was to hit its bank account. Plaintiffs' counsel stated that Exxon could satisfy a large punitive judgment in very little time with the interest that accrues on its $72 billion in shareholders' equity and that it likely would never feel the effect of the judgment because it would be passed on to the consumers at the gas pumps. Counsel also pointed out that Exxon recently had been cast in judgment for several other large punitive damage awards, including a case in which an Alabama jury awarded the plaintiffs punitive damages of $3.4 billion and compensatory damages of $87 million. Such assertions bore no relationship to the harm suffered by the plaintiffs. Although the jury could consider Exxon's wealth, the

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[26] The record reflects that during jury deliberations, the foreperson sent a note to the trial court inquiring as to whether any of the punitive damage award would go to compensate the people in the community. After discussions with counsel, the trial court instructed the jury that the entire punitive award would go only to the Grefers.

company's wealth could not provide an open-ended basis for inflating the punitive award. With this in mind, we find the $1 billion dollar punitive damage award is neither reasonable nor proportionate to the amount of harm to the plaintiffs and to the general damages recovered. Considering the substantial compensatory damages awarded in this case, in our opinion a lesser single-digit ratio would be appropriate.

The third guidepost in *Gore* is the disparity between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. The Court in Campbell noted that criminal penalties may also be considered, as the existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. *Campbell*, 538 U.S. at 428, 123 S. Ct. at 1526. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. *Id.* Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, its higher standard of proof. *Id.* Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically justify a punitive award. *Id.*

Exxon argues that it did not violate any state laws or regulations because the DEQ did not establish NORM regulations until 1989[27] and therefore

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[27] The DEQ first established NORM regulations by emergency rule in February 1989, by amending the Louisiana Radiation Regulations to add Chapter 14, titled "Regulation and Licensing of Naturally Occurring Radioactive Material

the punitive damage award is not warranted. It also argues that the maximum civil penalty under Louisiana law for willful conduct would not exceed $1,000,000.00, and thus if punitive damages are imposed, the amount should not exceed $1,000,000.00.

In the case of *In re New Orleans Train Car Leakage Fire Litigation*, 2000-0479, p. 1 (La. App. 4 Cir 6/27/01), 795 So. 2d 364 (hereinafter "CSX"), we affirmed the trial court's reduction of a jury's punitive damage award from $2.5 billion to $850 million. That case involved personal injury claims by 8,047 class members for injuries arising out of a burning train car carrying a hazardous substance. In reaching our result, we recognized the large number of claimants, their personal injury, the potential that many city blocks could have been destroyed by an explosion, and the evacuation of thousands during the night because of the danger posed by burning chemicals. Like Exxon, the defendant argued in *CSX* that because the maximum civil penalty under Louisiana law for its violation was slightly more than $1,000,000.00 that should have been the amount of the jury's punitive award. We disagreed, noting that "the *BMW* Court did not select and use the term 'guideposts' without reason", and that term does not "connote or suggest a cumulative series of three 'tests' or 'elements' which must be met." *CSX*, at p. 33, 795 So. 2d at 386. We then specifically re-

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(NORM)." See La. Reg. 71-72 (2/20/89); LAC 33:XV.1401. *et seq.* Those regulations apply to soil contaminated with NORM, as well as waste management, transfer, and disposal with regard to sites and facilities involved in storage and/or cleaning of tubulars and contaminated equipment. LAC:XV.1402.

jected the notion "that the third guide . . . 'caps' punitive damages." *Id.* at p. 33, 795 So. 2d at 386-87.

The plaintiffs point to various criminal fines for violations of Louisiana statutes and regulations and give examples in which fines of tens of thousands of dollars a day would be imposed every day for the years Exxon was in violation of the law. Notably, in *Cooper*, the Court rejected an effort, similar to the plaintiffs' here, to suggest that the maximum fine provided by an Oregon statute would have been imposed each time a piece of promotional literature was distributed, 532 U.S. at 442-43, 121 S. Ct. at 1689, while in Campbell the Court rejected an attempt to justify a large award based on speculation about whether, in a criminal prosecution, the defendant might have lost its business, license, been imprisoned, or been required to disgorge all profits.

The fact that Louisiana had no regulations governing NORM until 1989 does not excuse Exxon's reprehensible action. And Louisiana's maximum civil penalty for willful misconduct, alone, cannot limit a punitive damage award. Nonetheless, based on our review of the record, we find that $1 billion punitive award in this case is exorbitant and must be reduced.

In summary, we find that an application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded, likely would justify a punitive damages award closer to the amount of compensatory damages. The punitive damage award of $1 billion, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and

arbitrary deprivation of Exxon's property. Therefore, we will amend the jury's award to reduce it to an amount that we have determined is both reasonable and proportionate to the amount of harm suffered by the Grefers and to the general damages of $56,145,000.00, which is $112,290,000.00 or twice the general damage award.

Interest on the Punitive Damage Award Judgment

The plaintiffs argue in their sole assignment of error on appeal that the trial court erroneously refused to attach prejudgment interest to the punitive damage award. We disagree.

In *CSX*, *supra*, we held that judicial interest may begin running on a punitive damage award no earlier than the time a court signs a judgment memorializing that award. *Id.* at pp. 53-54, 795 So. 2d at 397-98. "Under both Louisiana and federal law, a plaintiff is entitled to interest on punitive damages only from [the] date of judgment." *Jordan v. Intercontinental Bulktank Corp.*, 621 So. 2d 1141, 1158 (La. App. 1st Cir. 1993).

ITCO's Fault

In this assignment of error, ITCO argues that the jury erred in finding it five percent (5%) at fault.

Prior to the close of trial, the parties and the trial court agreed that there would be only one jury interrogatory pertaining to ITCO's liability under different theories of recovery and the trial court so instructed the jury. In effect, ITCO stipulated that a finding of "fault" could encompass liability for negligence, nuisance, strict liability, and breach of the

lease agreement. ITCO specifically stipulated that a finding of fault against ITCO would be a prima facie "finding of a breach of lease for purposes of the record and the judgment and the appeal."

The jury's finding of 5% fault against ITCO is entitled to substantial deference on appeal and must be affirmed unless we find the jury was manifestly erroneous. *See Stobart v. State, Through DOTD*, 617 So. 2d 880, 882 (La. 1993). The issue to be resolved by the reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was reasonable. *Id.*

After reviewing the record, we find the jury reasonably could have found ITCO at fault for breaching its lease with the Grefers. Paragraph 14[28] of the leases provide:

> Lessee shall maintain in good order and condition any buildings or other improvements it may erect on the leased premises, as well as the ground surrounding the same, and said property shall never be so used as to create nuisance.

The evidence in the record reflects that ITCO had erected at least one pipe-cleaning machine, as well as numerous roads and pipe racks, on the Grefer property. ITCO claims it did not breach the lease because it never erected any buildings on the Grefer property. Though an "improvement" is not defined in the ITCO/Grefer lease, the pipe-cleaning machine, pipe racks, and roads fall within the definition given in Black's Law Dictionary. An improvement is an

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[28] This provision appears as paragraph 15 in two of the leases.

"addition to real property, whether permanent or not . . . that increases its value or utility." BLACK'S LAW DICTIONARY 761 (7th ed. 1999). The photographs introduced into evidence depict that the pipe-cleaning machines, pipe racks, and roads are improvements. Furthermore, Mr. Hooper acknowledged that ITCO found NORM contamination in the area of the pipe racks and the cleaning machines. Testimony also reflects that ITCO used the discarded contamination scale to build roads on the property. In view of the evidence and the number of years ITCO occupied the Grefer property, we cannot say the jury erred in allocating some fault to ITCO.[29]

INDEMNITY

Exxon argues in its final assignment of error that the jury erred in finding that it must indemnify ITCO. Exxon contends that the contracts between ITCO and Exxon do not contain a contractual indemnity clause in favor of ITCO and that tort indemnity is not available since ITCO was allocated a share of the fault.

The record reflects that the jury answered affirmatively to interrogatory number 11, which read, "If you answered yes to numbers 3 and 4 and assigned a percentage to ITCO in number 7, do you find that ITCO is entitled to recover from Exxon all amounts awarded against ITCO under its counterclaim against Exxon?"

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[29] Considering our conclusion that ITCO breached its contract with the Grefers, we need not address whether ITCO's fault is based on any other theory of recovery.

Exxon is correct that ITCO has no claim for contractual indemnity and that if this were a tort indemnity case then La. C.C. art. 1804 and the decision in *Diggs v. Hood*, 772 F.2d 190 (5th Cir. 1985) would preclude the claim of indemnity because ITCO was found partially at fault. However, even though ITCO asserted a claim against Exxon for indemnity and/or contribution, the record reflects that ITCO's counterclaim was for a breach of duty to disclose, i.e., breach of contract.

Pursuant to Article 19 of the 1985 ITCO/Exxon contracts, Exxon assumed specific health and safety disclosure obligations. Those obligations were refined in the amendments, dated in October and November 1985, which read in pertinent part:

> Exxon will make available, to Contractor, and it shall be Contractor's responsibility to review, such material safety data sheets as pertain to known toxic and hazardous substances to which Contractor's employees or subcontractors are likely to be exposed while performing any particular or individual work task on behalf of Exxon.
>
> * * *
>
> Exxon's contract representative or his designee and Contractor's appointed safety and health supervisors will meet on a regular basis, preferably at the beginning of each Exxon shift that Contractor is working, to determine whether any changed condition or specific health and safety hazards will be encountered during the work to be done during the shift. Additional meetings during each shift will be held if though necessary

by Contractor's safety and health supervisor or Exxon's contract representative.

Clearly, these provisions imposed on Exxon a duty to disclose to ITCO any known toxic and hazardous substances to which ITCO's employees or subcontractors were likely to be exposed and to disclose whether any changed condition or specific health and safety hazards would be encountered during the work. In view of our finding that Exxon's conduct was wanton and reckless for failing to notify ITCO in a timely manner of the NORM contamination in its piping/tubulars, we find Exxon did, in fact, breach its duty to warn ITCO and that the jury did not err in finding that, based on ITCO's counterclaim against Exxon, ITCO was entitled to recover from Exxon all amounts awarded against ITCO on the plaintiffs' main demand.

CONCLUSION

Accordingly, for the reasons stated herein, the judgment of the trial court rendered in accord with the jury verdict in favor of the Grefers is amended, in part, to reduce the $1 billion award for punitive damages to $112,290,000.00 to comply with the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In all other respects, the judgment is affirmed. Furthermore, the trial court judgment denying Exxon's exception of prescription is affirmed.

AMENDED AND, AS AMENDED, AFFIRMED

APPENDIX C

TRIAL COURT JUDGMENT

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 97-15004 DIVISION "A"

JOSEPH GREFER, CAMILLE GREFER, ROSE MARIE GREFER HASSI, AND HENRY GREFER

VERSUS

ALPHA TECHNICAL, ET AL.,

JUDGMENT ON JURY VERDICT

This cause having been duly tried before and submitted to the jury and the jury having on May 22, 2002 returned a verdict on special interrogatories at the conclusion of trial, as follows:

1. Do you find that Exxon was at fault?

   Yes _X_ No _____

   If you answered number 1 yes, then go to number 2.

2. Do you find that Exxon's fault caused damage to the Grefer property?

   Yes _X_ No _____

3. Do you find that ITCO was at fault?

   Yes _X_ No _____

   If you answered number 3 yes, then go to number 4.

4. Do you find that ITCO's fault caused damage to the Grefer property?

   Yes __X__ No _____

5. Do you find that any other entity was at fault?

   Yes __X__ No _____

6. If the answer to number 5 is yes, do you find that the fault of any other entity caused damage to the Grefer property?

   Yes __X__ No _____

7. If you answered yes to either numbers 2, 4 or 6, what percentage of responsibility do you find as to the following entities?

Exxon	85 %	
ITCO	5 %	
Alpha Technical	5 %	
OFS Inc.	5 %	
Chevron	0 %	
Texaco		0 %
Total	100 %	

8. Do you find that, if awarded restoration damages, plaintiffs intend to restore their property?

   Yes __X__ No _____

9. What, if anything, do you find to be the cost to restore the plaintiffs' property?

   $ 56,000,000.00 (FIFTY SIX MILLION DOLLARS)

10. What amount do you award to compensate the plaintiffs for their damages, exclusive of restoration costs?

$ 145,000.00 (ONE HUNDRED AND FORTY FIVE THOUSAND DOLLARS)

11. If you answered yes to numbers 3 and 4 and assigned a percentage to ITCO in number 7, do you find that ITCO is entitled to recover from Exxon all amounts awarded against ITCO under its counterclaim against Exxon?

Yes X No ____

12. Do you find that Exxon is responsible for exemplary damages to the plaintiff?

Yes X No ____

13. If you answered yes to number 12, what amount do you award as exemplary damages?

$ 1,000,000,000.00 (ONE BILLION DOLLARS)

Each and every interrogatory submitted to the jury as aforesaid was answered in the manner indicated by at least nine (9) members thereof, as determined by a poll of jurors. In accordance with the jury's findings, the Court will enter judgment thereon, as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Plaintiffs, JOSEPH GREFER, HENRY GREFER, ROSE MARIE GREFER HAASI, and CAMILLE GREFER, and against Defendants, Exxon Mobil Corporation and Intracoastal Tubular Services, Inc., for all com-

pensatory damages sustained, with legal interest thereon from the date of judicial demand, until paid, and for all costs of these proceedings. The liability of each defendant for compensatory damages shall be joint, several, and in solido.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the fault of each defendant for compensatory damages to plaintiffs are:

1. ExxonMobil: Eighty-five percent (85%) of said judgment; and
2. Intracoastal Tubular Services, Inc.: Five percent (5%) of said judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs are awarded ($56,000,000.00 (FIFTY SIX MILLION DOLLARS) as compensatory damages to restore the property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs are awarded $145,000.00 (ONE HUNDRED FORTY FIVE THOUSAND DOLLARS) as compensatory damages exclusive of restoration costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be a judgment in favor of Plaintiff-in-Cross-Claim, Intracoastal Tubular Services, Inc., against Defendant-in-Cross-Claim, Exxon Mobil Corporation, for all damages awarded to Plaintiffs and cast against Defendant, Intracoastal Tubular Services, Inc.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, in addition to the awards for compensatory damages, there be a judgment in favor of Plaintiffs and against Exxon Mobil Corporation for

exemplary damages, in the amount of $1,000,000,000.00 (ONE BILLION DOLLARS), with legal interest thereon from the date of this judgment, until paid, and with costs to be fixed by the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, in accordance with the provisions of LSA-C.C.P. art. 1915 (B)(1), the Court finds that there is no just reason for delay and that, accordingly; this judgment is designated by the Court to be final and appealable.

New Orleans, Louisiana, this 22nd day of June, 2001.

s/ Carolyn N. Gill-Jefferson
JUDGE, CIVIL DISTRICT COURT

A TRUE COPY
s/ (illegible)
DEPUTY CLERK, CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

APPENDIX D

LOUISIANA COURT OF APPEAL OPINION DENYING REHEARING

No. 2002-CA-1237
COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

* * * * *

JOSEPH GREFER, CAMILLE GREFER, ROSE MARIE GREFER HASSI AND HENRY GREFER,

VERSUS

ALPHA TECHNICAL, ET AL.

* * * * *

ON APPLICATION FOR REHEARING

* * * * *

Court of Appeal Fourth Circuit

Filed May 16, 2005

s/ (illegible)
Clerk of Court

We clarify our original opinion on two points, but deny the rehearing.

The cases of *Roman Catholic Church of Archdiocese of New Orleans v. Louisiana Gas Service Co.*, 618 So. 2d 874 (La. 1993) and *Corbello v. Iowa Production*, 02-0826 (La. 2/25/03), 850 So. 2d 686, cited in our original opinion, are applicable to show that there is a basis for the awarding of damages that greatly exceed the value of the property regardless of whether the claim is in tort or contract so long as a

reasonable basis exists in the record to support the finding. In this case, the jury was presented with several estimates evidencing the cost to remediate the Grefer tract, including the $46,000.00 figure advanced by Exxon, Mr. Cargill's estimate of $1,387,310.00, which is closest to the actual market value of the property, and Mr. Waligora's estimate of $82,000,000.00. The jury awarded restoration damages of $56,000,000.00, an amount between the two highest estimates. Because there is a reasonable basis in the record to support the jury's finding, we cannot say the jury was clearly wrong in awarding that amount.

With respect to exemplary damages, Exxon argues, citing *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524 (2003), that the conduct that allegedly put ITCO's employees at risk has no place whatsoever in the punitive damages analysis because harm to third parties cannot be punished. This, in our view, is an incorrect and exceedingly narrow reading of *Campbell*. In reviewing an award of punitive/exemplary damages, we have the responsibility of looking to the callous, calculated, despicable and reprehensible conduct of Exxon during the time period in question. Even though this case is not a personal injury claim by the ITCO workers, the mindset of Exxon should be considered in deciding whether the sum awarded was appropriate. The fact that Exxon showed no regard for ITCO's workers, i.e., no concern for human safety, certainly demonstrates that it had even less concern for the property damage that it caused, thus further demonstrating the morally culpable nature of its conduct.

The jury's $1 billion exemplary damage award under any standard, pre-*Campbell* or post-*Campbell*, is manifestly erroneous. However, based upon the jury's compensatory award, the manner in which Exxon was less than forthcoming about the NORM contamination on the Grefer property/ ITCO leasehold when weighed against the size of Exxon's bureaucracy and the potential for causing mass hysteria in the community if the disclosure was made in less than a careful manner after discovery of the NORM problem, warrants an award of twice the compensatory damage award as the highest figure that a reasonable jury could award in view of *Campbell.*

TOBIAS, J., CONCURS IN THE DENIAL OF THE REHEARING AND ASSIGNS REASONS.

I respectfully concur in the denial of the rehearing in order to assign additional reasons in support thereof.

In our original opinion, we discussed at some length the cases of *Roman Catholic Church of Archdiocese of New Orleans v. Louisiana Gas Service Co.*, 618 So. 2d 874 (La. 1993) and *Corbello v. Iowa Production*, 02-0826 (La. 2/25/03), 850 So. 2d 686. However, we did not fully discuss the tension between them, which, in my view, makes the jury's determination of compensatory damages neither manifestly erroneous nor clearly wrong. In a supplemental application for rehearing, Exxon cites this court to *Hornsby v. Bayou Jack Logging*, 04-1297 (La. 5/6/05), ___ So. 2d ___, 2005 WL 1058888, 2005 WL 1058149, 2005 WL 1058898, a case decided by the

Supreme Court while Exxon's application for rehearing in this case was pending before this court.

Corbello is a contract case decided by the Louisiana Supreme Court *after* the appeal in the case at bar was docketed in this court. *Roman Catholic Church* is not a pure tort case. Underlying the recovery in *Roman Catholic Church* is the Church's *contractual* obligation to the U.S. Department of Housing and Urban Development ("HUD") that required the Church to operate the property for low-income individuals for a fixed period of time, in default of which ownership of the property would revert to HUD. Thus, I find that it is reasonable to read the two cases *in pari materia.* Whereas, the Grefers' claims against ITCO sound in both contract and tort, their claims against Exxon are in tort.

In *Roman Catholic Church*, at the time of suit the Church had already expended a very substantial sum to restore the property. In context, that was reasonable. In *Corbello*, the plaintiff had not expended anything, yet was allowed to recover $33 million without any obligation to spend anything to restore the damaged thing. As I read *Corbello*, where the restoration (remediation) is contractual the restoration costs may include apparently speculative costs without an obligation to expend the money to restore, but where the remediation costs are tort based, only actual sums expended can be considered.

If the Supreme Court in *Corbello* read out of the contract at issue therein the word "reasonably," how can we find an award of $56 million by the jury is unreasonable?

We found that the Grefers had "both personal and economic reasons for wanting to restore their property to its original condition." We reached this conclusion, relying upon Judge Grefer's statements that (a) "he and his siblings want to restore the property, which has been in the Grefer family since 1875, to its original condition and not to the mere minimum DEQ standard"; (b) he and his siblings were "unable to sell or lease the contaminated property without exposing themselves to liability and they do not want to burden their children with this"; and (c) he expressed "grave concern about the effects the radioactive contamination might have on the neighbors and the general public." A trier of fact has the right to weigh that testimony and give it such weight as deemed appropriate.

One might assert that Judge Grefer was framing his answers to questions propounded to come within the ambit of *Roman Catholic Church*'s personal-to-the-owner test, ignoring the language in the case referring to the "homestead", i.e., one's personal dwelling (which is not the case of the Grefers). But again, this falls to the trier of fact to weigh and evaluate.

In my view, the Supreme Court's standards for recovery must be understood in the context of the whole body of the law respecting recovery of damages. Among these are the doctrine of waste and the reasonable person. How can we conclude in light of the damage award in *Corbello* ($33 million to remediate a property having a value of $108,000) that the $56 million award is unreasonable? One might argue that the Grefers will remediate the property down to levels that make it commercially viable and usable, i.e., levels within the guidelines of the Lou-

isiana DEQ and/or levels that will satisfy a financial institution that it can safely lend money on the property without the exposure of having to remediate the property at substantial cost should the property come into the financial institution's ownership by virtue of foreclosure. But is that difference in dollars not a justified award? The plaintiffs will likely expend substantial sums in defense of third party claims and responding to any awards of damages.

Hornsby is distinguishable on its facts. The case addresses damages for the improper cutting of trees, where a special statute specified what damages were recoverable and the penalties associated therewith. In my view, a material difference exists between cutting of trees and contamination from radioactivity. A landowner can sell his property without trees on it, and the value of the land may be reduced because of the absence of the trees. However, land contaminated with radioactivity at a level which makes the land unmarketable or undevelopable because no financing entity will loan money thereon as discussed above, is something that is certainly very personal to the owner when the contamination is caused by a third person. Thus, Judge Grefer's testimony to the effect that he and his family are unable to sell or lease the contaminated property without exposing themselves to liability is something that comes within the ambit of something personal to the owner. Superimpose on this that, unlike *Roman Catholic Church* where the Church had the financial resources to repair the damage, the Grefers are apparently without the financial resources to remediate their property without first recovering the funds to

do so. Is not the jury's determination in this case reasonably within their discretion?

Finally, although some of the NORM was deposited upon the Grefers' property prior to the enactment of La. C.C. art. 2315.3, without doubt some of the NORM was deposited after the amendment to the Civil Code. Additional injury occurred to the Grefers after 1984 and the jury was within their discretion to determine that one could not remediate the pre-1984 contamination without remediating the post-1983 remediation.

APPENDIX E

LOUISIANA SUPREME COURT ORDER DENYING CERTIORARI REVIEW

THE SUPREME COURT OF THE
STATE OF LOUISIANA

JOSEPH GREFER, CAMILLE GREFER, ROSE MARIE GREFER HASSI AND HENRY GREFER

VS.

ALPHA TECHNICAL, ET AL.

No. 2005-C-1590

IN RE: Exxon Mobil Corporation; - Plaintiff; Applying for a Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. A., Nos. 97-15004; to the Court of Appeal, Fourth Circuit, No. 2002-1237

March 31, 2006

Denied.

BJJ

PFC

CDK

CDT

JTK

VICTORY, J., would grant.

WEIMER, J., would grant.

Supreme Court of Louisiana
March 31, 2006

s/ (illegible)
Deputy Clerk of Court
For the Court

APPENDIX F

UNITED STATES SUPREME COURT ORDER GRANTING CERTIORARI REVIEW

(ORDER LIST: 549 U.S.)

MONDAY, FEBRUARY 26, 2007

CERTIORARI -- SUMMARY DISPOSITIONS

05-1670 EXXON MOBIL CORPORATION V. GREFER, JOSEPH, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of Louisiana, Fourth Circuit for further consideration in light of *Philip Morris USA* v. *Williams*, 549 U. S. ___ (2007). Justice Alito took no part in the consideration or decision of this petition.

APPENDIX G

LOUISIANA SUPREME COURT ORDER DENYING CERTIORARI REVIEW

NEWS RELEASE # 073

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the **16th day of November, 2007**, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

WRIT APPLICATION DENIED:

2007-C -1800 JOSEPH GREFER, CAMILLE GREFER, ROSE MARIE GREFER HASSI AND HENRY GREFER v. ALPHA TECHNICAL, ET AL. (Parish of Orleans)

KIMBALL, J., would grant.
VICTORY, J., would grant.

APPENDIX H

UNITED STATES SUPREME COURT ORDER DENYING APPLICATION FOR STAY

(ORDER LIST: 547 U.S.)

MONDAY, MAY 15, 2006

ORDERS IN PENDING CASES

05A981 EXXON MOBIL CORPORATION V. GREFER, JOSEPH, ET AL.

The application for stay addressed to Justice Kennedy and referred to the Court is denied.

APPENDIX I

JURY INSTRUCTIONS

[R.56:159]

Under our law, in addition to the award of damages to compensate a plaintiff for the injuries suffered, you may award exemplary damages against a defendant when the plaintiff shows that the defendants were wanton or reckless in their disregard for public safety in the storage, handling or transport of hazardous or toxic substances.

For the purposes of awarding [R.56:160] exemplary damages, "wanton" and "reckless" mean something more than mere negligence. The defendant must have known that public safety was at risk or should have known it was highly probable that harm to the public would result from his conduct. In other words, in order to find "wanton" or "reckless" conduct, a plaintiff must prove the defendant's alleged acts and omissions of negligence were accompanied by a conscious indifference to consequences amounting almost to a willingness that harm to the public safety would follow.

Exemplary damages are regarded as a fine or penalty for the protection of the public interest. Such damages are given to the plaintiff over and above the full compensation for the plaintiff's losses for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example. Exemplary damages are not awarded to benefit the injured party but to compel the wrongdoer to have due and proper regard for the rights of the public. You should award an amount of exemplary damages

which you feel will be reasonably likely to accomplish that purpose in this case.

Another factor you may consider in [R.56:161] determining the amount of the exemplary damage award is the nature and the extent of the harm to the plaintiffs. You may also consider each defendant's financial position when determining the amount of exemplary damages to be awarded because the award is meant to be meaningful enough to actually deter the wrongful conduct.

Even if you decide that the plaintiffs are entitled to exemplary damages, you may not award such damages for conduct that the defendants engaged in before 1984 or after 1996.

Exemplary damages are within your discretion. This means even if you find that the defendant's conduct was wanton or reckless, you are not required to award exemplary damages to the plaintiffs.

88

(2)

No. 07-1055

FILED

MAR 17 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

JOSEPH GREFER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. DID EXXON'S FULL, VOLUNTARY AND UNCONDITIONAL PAYMENT OF THE PUNITIVE DAMAGE AWARD EFFECT A WAIVER OF ANY ISSUES ON APPEAL AND RENDER THIS PETITION MOOT?

2. DID EXXON'S FAILURE TO PRESERVE ANY *WILLIAMS* OBJECTIONS WAIVE THOSE ISSUES?

3. DOES *WILLIAMS* EXPLICITLY PERMIT CONSIDERATION OF HARM TO THIRD PARTIES IN ASSESSING THE REPREHENSIBILITY OF EXXON'S MISCONDUCT?

4. DID THE LOUISIANA COURTS PROVIDE EXXON FULL DUE PROCESS PROTECTION – EVEN THOUGH EXXON DID NOT REQUEST IT?

5. DOES *WILLIAMS* REQUIRE A RETRIAL?

6. IS ANY *STATE FARM* RATIO ISSUE BEYOND THE SCOPE OF THIS COURT'S REMAND, WAS IT RAISED IN THE COURTS BELOW, AND IS IT EVEN ARGUABLY MERITORIOUS?

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STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

(1) Exxon Has Unconditionally Paid The Punitive Damage Award Contested Here.

At the outset, we note that after a series of discussions and negotiations by and between counsel for the Grefers and Exxon Mobil Corporation (hereinafter "Exxon"), reflected in correspondence by and between said counsel, Exxon "unconditionally" paid to the Grefers the full punitive damage award.[1] (Resp. App. 1a-26a). As Respondents assert hereinafter, this payment renders Exxon's Petition moot.

(2) The Grefer Property.

The instant suit involves a large tract of land owned by the Grefer family for over 125 years which, due to the wanton, reckless, and reprehensible conduct of Exxon, was thoroughly inundated with radioactive waste. The damage to this property began in 1968 when Intracoastal Tubular Services, Inc. ("ITCO") first leased the Grefer property from the Grefer family in order to operate a pipe yard for transporting, storing, cleaning, and inspecting Exxon's oilfield pipe.

During the many years of operations on the Grefer tract, Exxon sent ITCO millions of sections of

---

[1] Exxon had previously paid the Grefers the full compensatory damage award, which is not at is e.

oilfield pipe encrusted with radioactive scale from Exxon's onshore and offshore oil production operations. R. 33:16.[2] This scale consisted of concentrated Radium-226, Radium-228, and their daughter products, collectively known as Technologically Enhanced Radioactive Material (TERM).[3] At Exxon's direction,[4] ITCO cleaned Exxon's pipes and allowed the waste to enter the environment in an uncontrolled fashion, as the radioactive scale fell from the pipes onto the ground when the pipes were transported in and around the yard, were off-loaded by crane or forklift, and were cleaned by both portable and stationary air rattling machines. R. 33:14-18, 34:48-52; R. 33:38-41, 34:49; Pl. Ex. 40-50. These rattling machines used high pressure air compressors that generated radioactive dust clouds. R. 33:17-19, 34:38. Aside from the deposit of scale from ITCO's cleaning operations, the radioactive scale in the pipes was also randomly

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[2] Citations to the trial court transcript are to the record filed with the Court of Appeal and take the form "R.[volume]:[page]."

[3] The acronym "TERM" refers to the radioactive scale deposits found in used oilfield drilling pipe. The acronym "NORM" is also used to describe that condition. *Grefer v. Alpha Technical*, 901 So.2d 1117, 1128, n.11 (La.App. 4th Cir. 2005); Petr. App. 48a. The decay of radium also generates Radon gas, which is a known human carcinogen.

[4] Exxon maintained offices at ITCO for its employees who managed materials, oversaw quality control, and supervised ITCO. R. 33:11-12, 46:40-41. The Grefers had no involvement with the industrial activities conducted by ITCO and Exxon on the property. R. 39:115-18.

buried and used as road and pipe rack building materials throughout the yard during all years of operations. R. 33:39-41, 34:48-52; ITCO Ex. 193(D). Estimates of the average amount of scale indicate that as much as *1.5 million pounds* of scale per cleaning machine was dispersed in the yard *each year*. R. 33:26, 29:10. *This waste was never removed from the yard, nor was there any record of a cleanup (of any sort).*

(3) Exxon's Conduct, Its Motivations and the Effect on the Grefer Family and Their Property.

The Fourth Circuit concluded that Exxon's actions in despoiling the Grefer property resulted from Exxon's "callous, calculated, despicable and reprehensible conduct during the time-period in question" (Petr. App. 114a), which showed that Exxon had no concern for human safety, "and even less concern about the property damage that it caused" to the Grefer family. Petr. App. 114a. Indeed, the facts clearly support that finding:

Exxon has long known of NORM contamination in oilfield equipment. Petr. App. 42a-43a. This knowledge pre-dated 1985, but in that year the United Kingdom Offshore Operators' Association – of which Exxon was a member – published safety guidelines and a reference manual that were distributed to all oil companies. The manual extensively covered the identification of radioactive scale in wells and the

procedure to follow up on such identification. Petr. App. 43a. Exxon officials felt that the guidelines were too onerous, restrictive, inflexible and unreasonable for Exxon's production operations in the United States. Petr. App. 88a.

Chevron discovered NORM contamination in its well sites in Mississippi in 1986. In May, 1986, after learning of Chevron's discovery, Exxon surveyed its Mississippi well sites and confirmed the presence of radiation in its equipment. Exxon's own hygienist admitted that had Exxon surveyed its U.S. wells sooner than 1986, it would have discovered radium in its wellheads sooner. Petr. App. 88a. Twice Exxon officials were notified that its cleaning contractors had to be informed of the radioactivity, since it posed a health and safety hazard, but Exxon still did nothing to warn them. Petr. App. 88a.

In fact, an internal memorandum written in August, 1986 by Exxon's then Director of Environmental and Regulatory Affairs showed that Exxon's "primary concern" after Chevron's NORM discovery was not health, safety or property clean-up – it was to get the oil industry and federal regulatory agencies to "slow down" the investigation into NORM contamination out of fear that the Environmental Protection Agency ("EPA") would increase its regulation and would eliminate the "produced water" exemption under the Resource Conservation Recovery Act ("RCRA"). Under that exemption oil companies such as Exxon are allowed to dispose of water produced

during drilling operations in an unregulated manner. Petr. App. 88a-89a.

Exxon's entirely selfish motivations were further demonstrated when the same Exxon official,[5] at a meeting of Exxon executives concerning NORM in January, 1987, calculated that the loss to Exxon if it were to lose its produced water exemption would be $750 million in the first year and $150 million for each subsequent year. Petr. App. 89a.

At the same meeting, several Exxon officials concluded that notifying pipe-cleaning contractors such as ITCO about the health and safety risks of NORM was "premature." Petr. App. 89a. This was contrary to the advice of an Exxon hygienist who had earlier opined that cleaning contractors such as ITCO had to be notified of the presence of radioactivity. Petr. App. 43a-44a.

Another confidential memo written by another Exxon executive in October, 1986 showed that Exxon wanted to downplay the NORM problem because of Exxon's potential exposure to litigation. The memo noted that litigation against Chevron by one of its pipe yard contractors had followed Chevron's disclosure of NORM contamination. The same memo noted that ITCO was a potential "look alike" to the Chevron contractor and suggested Exxon perform "low key"

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[5] The same Exxon official also wrote that Chevron's discovery was "nothing new." Petr. App. 89a-91a.

radiation exposure measurements. Petr. App. 89a-90a.

Exxon did not send any notification to ITCO until March, 1987 (five months after the October, 1986 memo, and ten months after it had identified the NORM problem at its domestic well sites), *causing further (and still unrestricted) contamination of the Grefer property*. Even then, Exxon downplayed the problem. In a videotape played for ITCO's president, Exxon portrayed the health risks associated with NORM as minor, and the safety procedure guidelines as merely suggestive of taking precautions to avoid breathing or ingesting airborne dust. Petr. App. 90a. *Exxon's inadequate warning did nothing to protect the Grefer property from further contamination or to address the problem already existing at the property.*

Even after Exxon no longer used ITCO as a cleaning contractor, Exxon was aware that contaminated equipment remained stockpiled on the Grefer property and was further aware of the danger posed by NORM-contaminated scale; *yet Exxon took no step to remove its radioactive material from the Grefer property*. Petr. App. 94a-95a.

At no point did Exxon notify or warn the Grefer family about the contamination at their property. R. 20:4946-48. *Rather, Exxon knowingly and intentionally left the Grefer family with a huge mess.* As a result of the radioactive contamination described above, the Grefers' long-held family property was despoiled. Petr. App. 95a. *Exxon's actions financially*

burdened the Grefers with the task of cleaning up the property. Petr. App. 95a. That burden, according to the jury, was $56 million (not the $1.5 million market value of the land asserted by Exxon). (Pet. 31.) This was less than the estimate of plaintiffs' expert, Mr. Stanley Waligora, and more than that of Exxon's expert.[6] Petr. App. 74a-77a. The Fourth Circuit determined that there was sufficient evidence to support the jury's award. Petr. App. 107a; 113a-115a. That judgment is now final and has been satisfied.[7]

Exxon's actions have not only exposed the Grefers to the expense of defending claims brought by third parties as a result of the contamination of the Grefer property but have also exposed the Grefers to significant potential liabilities. Petr. App. 117a-118a. In fact, a number of suits have already been instituted against the family.

B. PROCEEDINGS BELOW.

The Grefers filed the instant suit in August of 1997 to recover damages for the burial, concealment and disposal of radioactive scale throughout the Grefer tract, a large (32.75 acre) property, located in a suburb of New Orleans. Trial Record Volume 34, pp.

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[6] R. 29:22, 29:36, 33:163-64, 33:166.

[7] Indeed, Exxon has unconditionally paid that amount, with interest, to the Grefer family. *See* Exxon's Motion For Stay and Renewed Motion For Stay, *ExxonMobil v. Grefer, Joseph, et al.*, No. 05A981.

35-36 ("R34:35-36"); Plaintiffs' Exhibit No. ("Pl. Ex.") 13; Pl. Ex. 35-39; ITCO Exhibit No. ("ITCO Ex.") 193(A). They sought compensatory damages for the costs of restoration, general damages associated with the damage to the Grefer tract, and exemplary (punitive) damages under Louisiana Civil Code art. 2315.3. Petr. App. 5a. After a five-week trial, the jury found Exxon 85% at fault, ITCO 5% at fault, and two absent defendants 10% at fault. The jury rendered a verdict of: (1) $56,000,000.00 for the cost of remediating the contamination at the Grefer tract; (2) $145,000.00 in general damages associated with the damage to the Grefer tract; and (3) one billion dollars in punitive damages assessed against Exxon.

The Fourth Circuit affirmed the judgment in its entirety but reduced the punitive award to an amount equal to twice the compensatory damage award. *Grefer v. Alpha Technical*, 901 So.2d 1117 (La.App. 4th Cir. 2005) ("*Grefer I*"); Petr. App. 107a; 113a-115a. Both the plaintiffs and Exxon applied for Writs of Certiorari to the Louisiana Supreme Court. The Louisiana Supreme Court denied both Writ Applications on March 31, 2006. Petr. App. 120a-121a.

On April 5, 2006, seeking to stay execution of the punitive damage award, Exxon filed in the Supreme Court of Louisiana an "Emergency Motion to Stay Execution of Judgment." The court denied the Motion on April 24, 2006.

On April 27, 2006, Exxon filed a Motion to Stay in this Court. Justice Scalia denied the Motion on

May 1, 2006. *ExxonMobil Corporation v. Grefer, Joseph, et al.*, No. 05A981. Exxon filed a Renewed Motion to Stay, which was referred to all members of this Court, and was also denied. *ExxonMobil Corp. v. Grefer*, 126 S. Ct. 2056 (2006).

Exxon then applied to this Honorable Court for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit. On February 26, 2007 this Court granted the writ, vacated the Fourth Circuit's decision, and remanded the case to the Fourth Circuit "for further consideration in light of *Philip Morris USA v. Williams*, 549 U.S. ___ (2007)."

The Fourth Circuit, after exhaustively reviewing its prior decision, the record of this case, and this Court's *Philip Morris* decision, elaborated and expanded on its "thought process" that went into its earlier opinion and reaffirmed its initial decree with regard to its award of exemplary damages. *Grefer v. Alpha Technical, on remand*, 965 So.2d 511, 526 (La.App. 4th Cir. 2007) ("*Grefer II*"); Petr. App. 33a.

Exxon applied for writs of certiorari to the Louisiana Supreme Court. That Court denied the application on November 16, 2007. Petr. App. 123a. Exxon now seeks review in this Honorable Court.

REASONS FOR DENYING THE PETITION

A. EXXON'S FULL, VOLUNTARY AND UNCONDITIONAL PAYMENT OF THE PUNITIVE DAMAGE AWARD EFFECTED A WAIVER OF ANY ISSUES ON APPEAL, AND RENDERED THIS PETITION MOOT.

Exxon has voluntarily and unconditionally paid the full amount of the punitive damages award included in the judgment entered below. Under applicable state law, that payment waived all issues on appeal. Exxon's petition is moot.

(1) Exxon's Payment of the Punitive Damage Award Was Unconditional.

Exxon "unconditionally" tendered to the Grefers the full punitive damages award contained within the June 22, 2001 judgment. This is clearly demonstrated by the letters attached, *in globo*, as Resp. App. 1a-26a. That correspondence demonstrates that the Grefers insisted at the time that, in order to stop the accumulation of interest, any payment must be "unconditional," and cited pertinent jurisprudence such as *American Motor Insurance Co. v. American Rent-All, Inc.*, 617 So.2d 944 (1993).[8] In his letter of May 18, 2006, Exxon attorney, Glen M. Pilié, wrote to Grefer attorney, Michael G. Stag:

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[8] Correspondence dated May 18, 2006 from Grefer attorney Michael G. Stag to Exxon attorney Glen M. Pilié. Resp. App. 5a-6a.

> ExxonMobil hereby makes an unconditional tender of full payment of the punitive damage component of the judgment and all legal interest thereon as of May 24, 2006 . . . [9]

Exxon thereafter unconditionally paid the Grefers the full amount of the punitive damage award, including legal interest.[10] The correspondence thus clearly shows that Exxon tendered and the Grefers accepted nothing less than an unconditional payment. Exxon's choice of the word "unconditional" was unqualified. Louisiana Civil Code art. 2047 provides that "the words of a contract must be given their generally prevailing meaning." Webster's Dictionary defines "unconditional" as "not limited: *absolute, unqualified* . . . "[11] Exxon uses the word "unconditional" or "unconditionally" in its correspondences dated May 18, 2006 and May 22, 2006, respectively. Resp. App. 7a-8a; 15a-16a. Because the Grefers had previously provided Exxon with pertinent jurisprudence which demonstrated that only an unconditional tender would stop the running of interest, Exxon knew, when it employed the word "unconditional," that the law imposed certain consequences on the use of the term. Exxon's transmission of funds, against

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[9] Resp. App. 7a-8a.

[10] Correspondence dated June 16, 2006, Stuart H. Smith to Mr. Pilié. Resp. App. 19a-20a; correspondence dated June 20, 2006, from Glen M. Pilié to Stuart H. Smith. Resp. App. 21a-22a.

[11] Webster's Ninth New Collegiate Dictionary (1986) (emphasis added).

this background, is proof of Exxon's deliberate and informed acceptance of the consequences of unconditional payment.[12]

(2) Exxon's Payment of the Punitive Damage Award Was Voluntary.

The correspondence reveals that Exxon was eager to terminate the accrual of interest on the punitive damage award. Exxon even asserted that it would attempt to deposit the funds into the registry of court if the Grefers refused to accept payment.[13] Coincident with its "unconditional" payment, Exxon asked for and obtained the Grefers' acknowledgment of the payment, allowing Exxon to release the suspensive appeal bond which it had posted.[14]

In short, Exxon paid the Grefers so that it could end its obligation to pay legal interest on the underlying judgment and premiums on the suspensive appeal bond. To achieve these savings, Exxon had to pay the money "unconditionally," and that is precisely what it did.

Exxon performed a simple risk analysis, balancing its chances of obtaining certiorari and a reversal

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[12] Exxon did not respond to Mr. Smith's letter (in which he accepted Exxon's "unconditional" tender) to clarify that the payment Exxon was making was not "unconditional."

[13] Correspondence dated May 18, 2006 from Mr. Stag to Mr. Pilié. Resp. App. 6a.

[14] Correspondence from Mr. Pilié to Mr. Smith dated June 20, 2006. Resp. App. 21a.

of the punitive damage award against the certainty of further accumulation of interest and bond premiums. Exxon opted to save the money.[15] This was a clear and deliberate choice, a choice which garnered Exxon an immense savings in interest and bond premium payments – a choice which Exxon was not just willing, but anxious, to make. Exxon thus benefitted from its "unconditional" tender in the form of legal interest and bond premiums saved, and clearly paid the money to obtain those benefits.

(3) Exxon's Unconditional and Voluntary Payment of the Punitive Damage Award Renders This Petition Moot.

The "unconditional" and voluntary payment by Exxon to the Grefers renders this petition moot because, under Louisiana law, the payment extinguished the action. In *Griffin v. International Insurance Company*, 727 So.2d 485 (La.App. 3d Cir. 1998), the defendants paid the full amount of the judgment with accrued interest and court costs into the registry of court, executing a document which asserted that the tender was "unconditional" and was made to "eliminate the continued accrual of legal interest pending plaintiff's delay for appeal and/or pending an appeal if taken." The defendants then appealed

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[15] Obviously, Exxon hoped it could pay the money and, nevertheless, seek to "vindicate" a legal principle, which is why it filed its Application for Writ of Certiorari with the U.S. Supreme Court.

the judgment. The Louisiana Third Circuit dismissed the appeal as moot:

> . . . to permit such an appeal would directly contradict La. Code Civ. P. art. 2085, which reads:
>
> > An appeal cannot be taken by a party who confessed judgment in the proceedings in the trial court or who voluntarily and unconditionally acquiesced in a judgment rendered against him. Confession of or acquiescence in part of a divisible judgment or in a favorable part of an indivisible judgment does not preclude an appeal as to other parts of such judgment.
>
> *We find that Abbeville and International Insurance voluntarily and unconditionally acquiesced in this judgment. Therefore, we find that although they have halted the accrual of interest on the amount of the judgment tendered, they are prohibited from appealing.*[16]

The unconditional payment of the punitive award in this case renders Exxon's petition moot, as under Louisiana law there is no longer a justiciable controversy. *Saint Charles Parish Sch. Bd. v. GAF Corp.*, 512 So.2d 1165, 1170 (La. 1987). It is well settled that

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[16] *Griffin* at 489. Emphasis added. It is instructive that in *Griffin* the defendant *thought* it could voluntarily and unconditionally pay the judgment and still prosecute its appeal.

courts will not decide abstract hypothetical or moot controversies. *Id.* at 170.

Accordingly, this Court should deny review for this reason alone.

B. EXXON'S FAILURE TO PRESERVE ANY *WILLIAMS* OBJECTIONS WAIVED THOSE ISSUES.

The *Williams* opinion sets forth a three-step analysis:[17]

- **First**, the court must find that there was a significant risk that the jury might utilize punitive damages to punish the defendant for misconduct to third parties.
- **Second**, the defendant must request a cautionary instruction.
- **Third**, the defendant must be afforded "some form of protection" to ensure that the jury's punitive damage award calculation does not include money meant to

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[17] "In particular, we believe that where the risk of that misunderstanding is a significant one – because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury – a court, upon request, must protect against that risk. Although the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide some form of protection in appropriate cases." *Philip Morris USA v. Williams*, 127 S. Ct. at 1065.

> punish the defendant for harm to third parties.

Regardless of whether or not the first element existed in this case, Exxon clearly failed to comply with the second element. The Fourth Circuit found that Exxon *failed to request a cautionary instruction.* Petr. App. 8a-9a; 13a. Despite this failure, the courts of Louisiana went out of their way to ensure that the final punitive damage award included only damages related to the Grefers' loss.

(1) The Trial Court's Instructions Were Proper, and Exxon Never Asked for the Relief It Now Demands.

Indeed, Exxon does not (and cannot) actually argue that the instructions which were given misstated the law. A comparison of the instructions requested by Exxon reveals that they differ very little – and, for purposes of this petition, not at all – from the instructions actually given by the trial court. The essence of the argument Exxon does make is that the trial court should have given the jury *additional* instructions, instructions which explicitly informed the jury that it could not include in its award sums meant to punish third parties – instructions which *Exxon never requested*, as is required under *Williams*.

The Fourth Circuit quickly and soundly dispatched this argument:

> Moreover, even though the record does not include the objections made by Exxon to the

> instructions during the jury charge conference, two facts should be noted. First, unlike the defendant in *Philip Morris*, Exxon raised no assignment of error on appeal as to either the trial court's jury instructions or to the trial court's refusal to give Exxon's proposed jury instructions. Second, for all intents and purposes, the trial court's instructions tracked almost verbatim Exxon's proposed instructions.[18]

As the Fourth Circuit recognized, the single most glaring fact of this case is that Exxon never requested the relief at trial which it now demands (nor did it timely raise the issue on appeal). The charge Exxon asked for was – "almost verbatim" – the charge which was given. Despite Exxon's assertion that it objected to the court's charge to the extent it did not include a "*Williams* instruction," *nothing in the record supports that claim.*[19] Pet. 9-10; 14. Tellingly, Exxon's proposed instructions contained nothing resembling a "*Williams* instruction" – an instruction which, this Court held, must only be furnished "*upon request.*" *Williams*, 127 S. Ct. at 1065.

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[18] Petr. App. 13a.

[19] In its writ application, Exxon does not point to an actual objection to the trial court's charge. At the Fourth Circuit, Exxon acknowledged that no such objection was in the record but suggested that the court should "assume" that it was made. To say the least, it is disingenuous of Exxon to suggest that it "may have" objected to the absence of something in the trial court's instructions *that Exxon did not bother to include in its proposed instructions.*

(2) Exxon's Failure to Request a *Williams* Instruction Waived the Issue.

There is no concept of "fundamental error" in the *Williams* opinion, or in any other opinion addressing the subject. Post-*Williams* cases uniformly recognize that a failure to raise the matter is a waiver of the issue. *See, e.g., Kauffman v. Maxim Healthcare Services, Inc.*, 509 F.Supp.2d 210 (E.D. N.Y. 2007) (defendant failed to request the instruction; issue waived); *Southstar Funding, LLC v. Sprouse*, 2007 U.S. Dist. LEXIS 22585 (D. N.C. 2007), n.2 (defendant failed to request the instruction; issue waived). The fact is that Exxon focused on different issues in its punitive damage trial, and only discovered the *Williams* principles when those tactics failed. Exxon did not request the relief it now demands, and it, therefore, failed the second prong of the *Williams* analysis.

(3) Exxon Also Waived the *Williams* Issue Under Louisiana Law.

This is consistent with Louisiana procedural law. A party who does not propose a jury instruction or who does not object to the omission of an instruction waives any right to appeal that issue. *Delaney v. Whitney*, 703 So.2d 709, 719 (La.App. 4th Cir. 1997), *writ denied*, 715 So.2d 1211 (La. 1998). The Louisiana Code of Evidence likewise required Exxon to propose a limiting jury instruction:

> When evidence which is admissible as to one party or *for one purpose* but not admissible as to another party or *for another purpose* is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly. *Failure to restrict the evidence and instruct the jury shall not constitute error absent a request to do so.* Louisiana Code of Evidence art. 105 (emphasis added).

Thus, the failure of Exxon to propose a limiting jury charge and/or to preserve that issue on appeal, constitutes an independent state ground for affirming the judgment without even reaching any federal question asserted by Exxon.

(4) Exxon Made No Due Process Objection to Evidence of Third-Party Harm.

Exxon's failure to request a limiting jury instruction was not its only failure to preserve the issue. Despite Exxon's assertion that evidence of alleged harm to non-parties was admitted into evidence over its objections, Exxon has cited *not one instance* in the trial record where it objected to evidence of harm to third parties on due process grounds, or where Exxon asked that the jury be instructed to limit its consideration of that evidence, much less an instance where such an objection was overruled.[20] Exxon's failure to

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[20] Exxon's argument about the admission of evidence of the risk posed to third parties is eviscerated by what concurrently

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object on due process grounds constituted a failure to preserve its rights to assert error on that basis. *See, e.g., Cooper v. AMI, Inc.*, 454 So.2d 156, 161 (La.App. 1 Cir. 1984), *writ denied*, 459 So.2d 539 (La. 1984). ("Different grounds for objection cannot be asserted on appeal.")

C. *WILLIAMS* EXPLICITLY PERMITS CONSIDERATION OF HARM TO THIRD PARTIES IN ASSESSING THE REPREHENSIBILITY OF EXXON'S MISCONDUCT.

Following remand, the Fourth Circuit carefully analyzed the actual punitive damage instruction given to the jury. Although *Williams* prohibits an award which includes money meant to punish the defendant for harm to third parties, *Williams* also makes clear that harm to third parties is very much a part of the reprehensibility analysis:

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transpired at trial: R. 32:17 (no objection); R. 32:122 (no objection); R. 32:131 (no objection); R. 33:19 (objection and motion to strike, no grounds stated, sustained); R. 33:200 (no objection); R. 34:38 (no objection); R. 29:131 (no objection); R. 29:137-41 (objection, foundation, sustained); R. 32:153 (objection, no grounds stated, sustained). The same is true of Exxon's assertion that plaintiff counsel's argument relating to the risks posed to third parties was improper: R. 56:36 (no contemporaneous objection); R. 56:42 (no objection); R. 56:43 (objection, relevance and prejudice, Grefers' counsel instructed not to mention incident); R. 56:51 (no objection); R. 56:53 (no objection); R. 56:84 (no objection); R. 56:95 (no objection).

> Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible – although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse.[21]

Indeed, this Court has stressed that reprehensibility is the most crucial aspect of a punitive damage award analysis. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 1599, 134 L.Ed.2d 809 (1996) ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575); *see also Action Marine, Inc. v. Continental Carbon Incorporated*, 481 F.3d 1302 (11th Cir. 2007).

Considering the reprehensibility of Exxon's misconduct, the Fourth Circuit observed:

> In reviewing an award of punitive/exemplary damages, we have the responsibility of looking to the callous, calculated, despicable and reprehensible conduct of Exxon during the time period in question. Even though this case is not a personal injury claim by the ITCO workers, the mindset of Exxon should be considered in deciding whether the sum

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[21] *Williams*, 127 S. Ct. at 1064.

> awarded was appropriate. The fact that Exxon showed no regard for ITCO's workers, *i.e.*, no concern for human safety, certainly demonstrates that it had even less concern for the property damage that it caused, thus further demonstrating the morally culpable nature of its conduct.[22]

That Exxon had little, if any, regard for human life and even less regard for the value of property is an appropriate and significant factor in determining whether punitive damages were warranted. The Fourth Circuit's conclusion that a nexus existed between Exxon's conduct towards non-parties and the harm to the Grefers is amply supported by the record. For instance, Exxon's failure to tell anyone about the contamination at the Grefer tract (whether for one year in the case of ITCO, or never in the case of the Grefers) not only put ITCO's workers and the surrounding neighbors at risk but also *led to further contamination of the Grefer tract.*[23] Additionally,

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[22] *Grefer I* at 1154-55. Petr. App. 114a.

[23] Exxon contends that by 1986 the property already required whatever remediation it was ever going to require. Pet. 14, n.4. Exxon then concludes, based on this contention, that the fact that it allowed further radioactive material to be dumped throughout the Grefer tract after learning of the NORM problem did not harm the Grefers. This is simply ridiculous. First, the disposal costs associated with the Grefers' clean-up plan (notably, the most expensive component of that plan) necessarily correlate with the amount of radioactive material in the soil. When Exxon dumped more radioactive material on the site, the Grefers' disposal costs (harm) went up. Second, allowing the property to be further contaminated increased the Grefers'

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Exxon's failure to properly warn ITCO (when a warning finally was given) and its failure to implement adequate screening and handling procedures at the yard, not only put ITCO's workers and the surrounding neighborhood at risk *but also led to even more contamination of the Grefer tract*, leaving the Grefers with a huge mess. Perhaps most important, Exxon's misconduct delayed the remediation of the property, allowing a hazard to remain on the Grefers' land and in their neighbors' community.[24]

Additionally, the risk posed by Exxon's conduct towards ITCO's workers and the surrounding neighbors was directly related to the potential harm to the Grefers. Because the Grefers are potentially liable to third parties under Louisiana law (as owners of the contaminated property), the nature and extent of the risks posed to third parties increased the potential liability of – and thus harm to – the Grefers,

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exposure to lawsuits and regulatory enforcement actions, subjecting them to further potential harm.

[24] This was clearly a fact the Fourth Circuit considered during its reprehensibility analysis. When discussing the financial vulnerability factor, the court found that the Grefers "are now financially burdened with the task of remediating the property." *Grefer I* at 1149; Petr. App. 96a. Later in its reprehensibility analysis, the court also found that "Exxon took no step to remove the radioactive material" from the Grefer tract. *Id.* at 1149; Petr. App. 96a. Exxon's suggestion at Pet. 8 that the Fourth Circuit found Exxon's conduct reprehensible based solely on a "nine-month delay in notifying ITCO" is flatly contradicted by these portions of the court's reprehensibility analysis.

a valid consideration under the second *BMW* guidepost. *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (confirming that the second *BMW* guidepost considers the ratio between the "harm, or potential harm, to the plaintiff and the punitive damages award").

Exxon's central argument is that because Exxon's misconduct threatened a different type of ***harm*** to third parties than the harm suffered by the Grefers, the jury could not consider the threat to the third parties. This is an incorrect statement of the law. *State Farm* holds that "a defendant's dissimilar ***acts***, independent from the ***acts*** upon which liability was premised, may not serve as the basis for punitive damages (538 U.S. at 423)." Exxon confuses "dissimilar acts" with "dissimilar harm." There is no requirement that in the reprehensibility analysis the applicable third parties must have suffered the same harm, but only that the misconduct to the third parties be similar to the misconduct to the plaintiff:

> Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible – although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless

posed a grave risk to the public, or the converse.[25]

Here, although the Grefers suffered a different "harm" from third parties such as ITCO and its workers, all were harmed by the similar – in fact, the same – *conduct* on the part of Exxon. This was a proper application of the reprehensibility analysis, and confirmed the Fourth Circuit's conclusion that "When we consider the totality of the trial court's jury instructions on exemplary damages, we find they are both permissible and constitutional."[26]

D. THE LOUISIANA COURTS PROVIDED EXXON FULL DUE PROCESS PROTECTION – EVEN THOUGH EXXON DID NOT REQUEST IT.

Although Exxon's voluntary and unconditional payment of the entire judgment rendered the case moot, the Fourth Circuit gave Exxon the benefit of the doubt and analyzed the *Williams* due process issue on its merits. In an opinion notable for its extended reconsideration of the punitive damage award, the Fourth Circuit determined that the constitutional safeguards missing in *Williams* were provided to Exxon. Despite the fact that Exxon never requested any form of protection at trial, as is required, there have been ***at least*** five different occasions upon which

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[25] *Williams*, at 127 S. Ct. 1064.

[26] Petr. App. 13a.

Exxon was, nevertheless, provided protection against any impermissible miscalculation of punitive damages. First, the jury instructions correctly stated the law. Second, the trial court clarified any potential jury misunderstanding before the verdict, by informing the jurors that the entire punitive damage award would be paid to the Grefers alone.[27] Third, the Fourth Circuit itself, in *Grefer I*, took elaborate precautions to cure any possible jury confusion, slashing the billion dollar punitive damage award to a sum directly proportional to the quantified compensatory damages awarded by the jury. Fourth, the punitive damage award was reassessed by the Fourth Circuit on rehearing. Fifth, the Fourth Circuit has again reviewed the punitive damage award after this Court's remand. That is to say that the case has been reviewed by a court of Louisiana ***twice*** since the Fourth Circuit's radical reduction of the punitive damage award. Exxon's argument that it was punished for harm to third parties, and not for harm to the Grefers, simply has not survived this intense appellate review. In its three separate opinions on the

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[27] Approximately one hour before the jury concluded its deliberations, the trial judge issued a further instruction in response to a jury question: "[E]xemplary damages are not compensation . . . Any exemplary damage award that you may make will be paid to the Grefers, no matter what amount you decide on." R. 59:16-17. This instruction made it clear that increasing the award based upon harm to people other than the Grefers would not benefit those non-parties, and thus, there was no reason for the jury to punish "directly on account of" that harm.

issue, the Fourth Circuit has explained, over and over again, that the harm to the Grefers was directly linked to the harm to third parties. Exxon's inexcusable delay in warning the Grefers, their tenants and others of the existence and danger of radioactive contamination allowed additional contamination of the Grefer property, and delayed the much-needed cleanup of the existing hazard. The Fourth Circuit ensured this relation between misconduct and award by molding the award to reflect a direct link of the Grefers' compensatory damages and the punitive damages awarded to them.

In short, the Fourth Circuit bent over backwards to assess, for the third time, whether Exxon received a fair trial on this matter. These extensive review procedures satisfied *Williams'* requirement of "some form of protection in appropriate cases." There is, thus, no conflict between the Louisiana courts' application of federal law in this case and the *Williams* decision.

There is no important question of federal law raised by this case which has not already been settled by this Court; nor does the Fourth Circuit's interpretation of federal law conflict with any decisions of any state court of last resort or of any United States court of appeals. Therefore, there is not one consideration supporting the grant of the writ petition under Rule 10.

E. *WILLIAMS* DOES NOT REQUIRE A RETRIAL.

Exxon argues at great length that procedural due process violations can only be cured by starting over again with a new trial. Exxon claims that the lower courts are split on this issue. Even assuming that Exxon had requested a limiting instruction as is required by *Williams* (it did not), and that the lower courts were actually split (they are not), neither *Williams* nor the post-*Williams* cases supports such a draconian view of the appropriate remedy for cases where – unlike the present case – a procedural due process violation has occurred.

First, and most obviously, *Williams* itself gave courts the option to choose how to deal with an instance where the jury improperly awarded punitive damages for harm to third parties:

> Although the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide ***some*** form of protection in appropriate cases. . . . the application of this standard may lead to the need for a new trial, ***or a change in the level of the punitive damages award.***[28]

This was fully consistent with the Court's opinion in *BMW of North America v. Gore*, 517 U.S. at 586:

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[28] *Williams*, 127 S. Ct. at 1065. Emphasis added.

> Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate the economic interests of Alabama consumers is a matter that should be addressed by the state court in the first instance.

It is also fully consistent with the Court's opinion in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. at 422, which remanded the case to the Utah courts for a recalculation of punitive damages – and not a retrial – where the jury instructions were held deficient because the jury had not been instructed "that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."[29]

A rigid view that remand is the ***only*** appropriate remedy would, of course, negate the Court's presumptively deliberate language in *Williams* that "a change in the level of the punitive damages award" may satisfy the procedural safeguard requirement. This has been implicitly recognized by all lower courts which have addressed the issue. There is no split of authority at all; the cases are fully consistent with this Court's guidance in the foregoing opinions. Although

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[29] On remand, the Utah Supreme Court made its own determination of an appropriate punitive damage award in accordance with the guidelines enunciated by this Court. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 411-412, 416 (Utah 2004), *cert. denied*, 543 U.S. 874, 125 S. Ct. 114, 160 L. Ed.2d 123 (2004).

Exxon claims that "[a] number of courts, both before and after *Williams*, have held that a reviewing court must order a new trial when a jury's award of punitive damages is based either on improper evidence or instructions," this is plainly incorrect, and the cases Exxon cites do not support Exxon's statement.

Exxon cites two U.S. Ninth Circuit cases, *White v. Ford Motor Company*, 500 F.3d 963 (9th Cir. 2007) and *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007 (9th Cir. 2007). The Ninth Circuit's conclusion that *Williams*-defective jury instructions required retrial may be explained by the fact that both cases were going to be remanded for new trials because of other errors anyway. Neither case held that retrial was required whenever a jury had not been provided with *Williams* guidelines, and both expressly recognized that *Williams* permits either remand or reduction in the award.[30]

In the California Second District Court of Appeals' decision in *Bullock v. Philip Morris USA, Inc.*, 159 Cal.App.4th 655 (Cal. Ct. App. 2d Dist. 2008), the court expressly recognized that:

> The use of a remittitur by a reviewing court is not limited to cases where the only error at trial was in the amount of the award. Rather, remittitur may be appropriate where instructional error resulted in an excessive

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[30] *White* at 500 F.3d 972-973; *Merrick*, at 500 F.3d 1017-1018.

> award and the amount of the excess is ascertainable . . . Moreover, in *Stevens v. Snow* . . . the California Supreme Court issued a remittitur reducing by one-half the amount of a judgment based on instructional error and error in the admission of evidence despite the Supreme Court's express acknowledgment that it could not determine how the errors affected the amount of the judgment.[31]

The *Bullock* court decided that "[i]n this case, we cannot determine how the instructional error that we have found affected the amount of the punitive damages award and we cannot substitute our own assessment of the appropriate amount of punitive damages for that of a jury." The reason for this was clear: the punitive damage award was – exactly – one million dollars for each of the 28,000 non-party Californians who plaintiff argued had died from smoking over the past 40 years. The lower court's reduction of this amount to $28 million dollars could not obscure the fact that the entire punitive damage award was clearly and precisely based on harm to non-parties. By contrast, the Louisiana Fourth Circuit's reduction of the award in this case corresponds, equally precisely, to the compensatory damages sustained by the Grefers, and is completely detached from any harm to any third party.

In order to create the appearance of a "split," Exxon at Pet. 22-23 cites cases which did not remand

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[31] 159 Cal.App.4th 696.

for a new trial. All of these cases pre-date *Williams*, and therefore do not have the advantage of this Court's explicit *Williams* analysis, nor do they discuss, or are even arguably concerned with, any "split" of authority.[32] Reduction by an appellate court was proper under *State Farm*; it is proper under *Williams*. These cases are hardly evidence of a split of authority. Indeed, Exxon has not cited one case which even purports to say that there is only One True Path to remedy a *Williams* violation. There is no split of authority for this Court to straighten out.

Williams' requires that state courts provide appropriate protection, not necessarily state trial courts. "Although the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide *some form of protection* in appropriate cases."[33]

Uniquely, Louisiana's Constitution provides for appellate review of both law and fact. When a Louisiana appellate court determines that trial errors may have influenced a jury's award, the appellate court is under a duty to review *de novo* the law and the facts and to render a judgment based upon that independent review. LA. Const. art. V, §10(B); *Temple v. Liberty*

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[32] This is also true of *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153 (Ky. 2004), which Exxon places in the "retrial only" camp.

[33] *Williams*, 127 S. Ct. at 1065. Emphasis added.

Mutual Ins. Co., et al., 330 So.2d 891, 892 (La. 1976) and *Riley v. Salley*, 874 So.2d 874, 878 (La.App. 4th Cir. 2004). Judicial economy, in addition to constitutional authority, encourages Louisiana appellate courts to review even factual findings because, when the entire record is before the appellate court, remand for a new trial produces "delay of the final outcome . . . while adding little to the judicial determination process." *Gonzales v. Xerox Corp.*, 320 So. 2d 163, 165-166 (La. 1975).[34] The Fourth Circuit, in its opinions below, recognized this unique function, and held that

> Furthermore, the U.S. Supreme Court remand and the *Philip Morris* decision do not mandate that we order a new trial but instead allow us to correct any procedural and/or substantive errors by our constitutionally delegated authority of *de novo* review. This court is constitutionally allowed to review both law and facts. La.Const. art. V, §10(B).[35]

This is absolutely correct. The Fourth Circuit's review ensured the due process protection discussed in *Williams*, despite Exxon's unequivocal failure to request it.

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[34] *See also Rodriguez v. Taylor*, 468 So.2d 1186, 1187 (La. 1985) and *Buckbee v. United Gas Pipe Line Co. Inc.*, 561 So.2d 76 (La. 1990).

[35] Petr. App. 33a.

F. ANY *STATE FARM* RATIO ISSUE IS BEYOND THE SCOPE OF THIS COURT'S REMAND, WAS NOT RAISED IN THE COURTS BELOW, AND IS NOT EVEN ARGUABLY MERITORIOUS.

(1) Exxon's 1:1 Ratio Argument Is Beyond the Scope of This Court's Remand and Was Not Preserved on Appeal.

The Order remanding this case was clear:

> The judgment is vacated and the case is remanded to the Court of Appeal of Louisiana, Fourth Circuit for further consideration in light of *Philip Morris USA v. Williams*, 549 U.S. ___, 127 S. Ct. 1057, 166 L.Ed.2d 940 (2007).[36]

The *Williams* opinion expressly did not consider any issue of proportionality between actual damages and punitive damages. "Because we shall not decide whether the award here at issue is 'grossly excessive,' we need now only consider the Constitution's procedural limitations."[37] Exxon did not raise the proportionality issue in either its brief to the Fourth Circuit or in its application for a writ to the Louisiana Supreme Court. Its petition for writ of certiorari to this Court is bare of any citation to where the proportionality issue has been preserved, as is required by Rule

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[36] *ExxonMobil Corp. v. Grefer*, 127 S. Ct. 1371 (U.S. 2007); Appendix 122a.

[37] *Williams*, at 127 S. Ct. 1063.

14(g)(i). Neither the Louisiana Fourth Circuit nor the Louisiana Supreme Court has considered the issue since Exxon's first appeal – and this Court did not deem the issue significant when it issued the GVR at the conclusion of that first appeal. Consequently the issue is unpreserved and should not be considered for the first time now.

Even if Exxon had preserved the right to argue that 1:1 ratio is the highest ratio constitutionally permitted in this case, the issue lacks any merit and does not justify this Court's review.

(2) Exxon's 1:1 Ratio Argument, Even if It Could Properly Be Raised At This Time, Does Not Merit This Court's Review.

a. The 2:1 Ratio In This Case Is Entirely Consistent With *State Farm*.

The *State Farm* decision provided the lower courts with further guidance with respect to the application of the *BMW* guidelines. For example, the Court instructed that "in practice, few awards exceeding a *single-digit ratio* between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425 (emphasis added). The Court also advised that "when compensatory damages are substantial, then a lesser ratio, *perhaps* only equal to compensatory damages, *can* reach the outermost limit of the due process guarantee." *Id.* (emphasis added). However, the Court

"decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* It reaffirmed that "the precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.*

Exxon's argument that a 2:1 ratio in this case is excessive cuts against everything this Court held in *State Farm*. This Court did not state (or even imply) that 1:1 ratios are the absolute limit in substantial damage cases.[38] If this Court had intended to do that, it would not have said "*perhaps* only equal to compensatory damages" and "*can* reach the outermost limit of the due process guarantee." This Court certainly would not have declined again to impose a bright-line ratio which punitive damages cannot exceed. Yet, again Exxon argues fervently that there is a cap, and that it is 1:1. Pet. 27, 31. In reality, *State Farm* allows for (and explains) the inconsistency in the lower courts that Exxon argues must be "resolved."

Recognizing that its argument that *State Farm* imposed a 1:1 ratio limit on substantial damage awards is a stretch among stretches, Exxon falls back

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[38] The history of the *State Farm* case after this Court rendered its opinion supports the Grefers' position. Following the Utah Supreme Court's reconsideration of the punitive award against State Farm and consequent reduction to a *9:1* ratio, this Court denied writs. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah), *cert. denied*, 543 U.S. 874 (2004).

to another (even less credible) argument. Specifically, Exxon asserts that, because the Grefer property only has a market value of $1.5 million, the ratio in this case is actually much higher than 2:1. Pet. 31. This argument is thoroughly flawed. To begin with, it disregards the fact that there are no cases which have held that actual harm, for purposes of a punitive damage analysis, can be limited to certain portions of a compensatory award. Indeed, both *BMW* and *State Farm* confirm that the compensatory award, as a whole, comprises the plaintiff's actual harm. *BMW*, 517 U.S. at 580 ("[E]xemplary damages must bear a 'reasonable relationship' to compensatory damages"); *State Farm*, 538 U.S. at 425 ("ratio between punitive and compensatory damages"). The lower courts are consistent on this point.[39]

Exxon cannot dispute that the compensatory portion of this award, pursuant to the Louisiana Fourth Circuit's final and executable judgment, is $56,145,000.00. In fact, recognizing that there is no basis to challenge the compensatory award in this Court, Exxon has already unconditionally paid that amount to the Grefers. In short, the actual harm in this case has been established. Exxon is foreclosed from arguing to this Court that a lesser amount is

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[39] Tellingly, all of the cases cited by Exxon at pages 28-29 of its Petition relate to the lower courts' consideration of the ratio between "*punitives*" and "*compensatories*." Pet. 28-29 (emphasis added).

somehow the "true" measure of the Grefer's harm in this case.

Moreover, Exxon's argument ignores the fact that, under Louisiana law, plaintiffs are entitled to have their property restored, even if the cost of the remediation plan exceeds the value of the land.[40] *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Serv. Co.*, 618 So.2d 874, 879-80 (La. 1993). In other words, Louisiana law instructs that the Grefers actual harm is the cost of clean-up.[41]

This result is sensible. Without the $56 million restoration award in this case, the Grefers would not be in a position to conduct a clean-up that ensures that their entire property complies with state and federal standards. In turn, the Grefers would be saddled with virtually never ending liability, and their actual and potential harm would *increase* with each passing day.[42] The Grefers would not be able to prevent new civil lawsuits, and they would have no way of complying with government enforcement actions.

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[40] Petr. App. 71a-80a; 113a-114a.

[41] Exxon does not challenge the constitutionality of this substantive law.

[42] Radium-226 has a half-life of approximately 1600 years. R. 32:144.

CONCLUSION

Exxon's petition for certiorari should be denied, for at least the following reasons:

- Exxon's full payment of compensatory and punitive damages has mooted this controversy under state law.

- Exxon completely failed to preserve any *Williams* procedural due process claim. It requested no limiting jury charge. Indeed, there is no meaningful distinction between the charge Exxon requested and the charge the trial court gave. Moreover, Exxon never objected to any evidence on due process grounds. *Williams* requires that the issue be preserved, and it was not. An equally dispositive point is that Exxon failed to raise an assignment of error on its original appeal as to the trial court's punitive damage instruction.

- Despite its utter failure to preserve these alleged due process issues on appeal, the Louisiana courts have bent over backwards to provide consideration to Exxon. The trial court fully analyzed the case on post-trial motions. The Louisiana Fourth Circuit has now reviewed this case three times. The Louisiana Supreme Court has twice rejected Exxon's writ applications as not meriting review. The analyses of these courts have carefully examined the trial and the verdict in exquisite detail, and have determined

that Exxon received the benefit of all due process protection afforded by *Williams*, *State Farm*, *Gore* and Louisiana's own cases. In particular, Louisiana's appellate system has ensured that any alleged evidence of harm to third parties introduced at trial was utilized only to establish reprehensibility – which is proper under *Williams*. The punitive damages assessed against Exxon were – exactly – twice the compensatory damages suffered by the Grefers, and do not reflect any harm to third parties.

- Exxon has provided no support for its contention that a procedural due process denial necessarily requires a complete retrial. Certainly, there is no split of authority in the lower courts reflecting such a dramatic new rule. Moreover, the Louisiana Constitution uniquely provides for appellate review of both law and fact.

- Exxon's *State Farm* proportionality issue was not the subject of this Court's remand, and was not deemed appropriate for separate review by this Court. Even if it were otherwise, the 2:1 ratio of punitive damages to compensatory damages is well within the permissible scope of constitutional limits.

In short, there are no compelling reasons for granting certiorari under Supreme Court Rule 10. The courts below properly applied the factors which

were the subject of the *Williams* decision – even before this Court issued the *Williams* opinion. Exxon's petition simply asks this Court to act as one more appellate court in this case. The petition should be denied.

Respectfully submitted,

STUART H. SMITH
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ADAMS AND REESE LLP

[Names And Addresses Omitted In Printing]

May 10, 2006

Via Facsimile No. (504) 581-4069
Ralph R. Alexis, III, Esq.
Porteous, Hainkel & Johnson, L.L.P.
704 Carondelet Street
New Orleans, LA 70130-3774

Re: *Joseph Grefer, Camille Grefer, Rose Marie Grefer Hassi, and Henry Grefer v. Alpha Technical, et al.*
CDC No. 97-15004, Division "A", Section 5
Our File No. 249-37

Dear Ralph:

In response to your letter dated May 9, 2006, this is to confirm that in the event ExxonMobil's renewed request for stay is denied by the U.S. Supreme Court, ExxonMobil will promptly pay the punitive damage judgment, thereby satisfying the entire judgment. In order to accomplish that, we will need to agree on a target date to pay the judgment so we can calculate a specific amount for the check. As with the previous payment of the compensatory damages award, ExxonMobil will need a letter on your letterhead stating the specific amount, the instructions for electronic transfer and tax identification number. I trust that this written confirmation satisfies your requirements to continue the hearing currently set for June 2nd. I will be out of town attending my son's graduation from UGA starting tomorrow and returning on Tuesday. In

my absence please direct any communications to Martin Stern.

With kind regards, I remain

Very truly yours,

ADAMS AND REESE LLP

/s/ Glen Pilié
Glen Pilié

GMP/rye

ADAMS AND REESE LLP

[Names And Addresses Omitted In Printing]

May 17, 2006

Via Facsimile No. (504) 593-9601
Michael G. Stag, Esq.
Smith Stag, LLC
365 Canal Street – Suite 2850
New Orleans, LA 70130

Re: *Joseph Grefer, Camille Grefer, Rose Marie Grefer Hassi, and Henry Grefer v. Alpha Technical, et al.*
CDC No. 97-15004, Division "A", Section 5
Our File No. 249-37

Dear Mike:

I have received your e-mail of today stating that because ExxonMobil plans to exercise its right to file a petition of certiorari, Plaintiffs refuse to accept payment of the punitive damage award and to execute a satisfaction of judgment, and that Plaintiffs will do so only if ExxonMobil promises not to exercise its right to file a petition of certiorari. There is no good faith basis for Plaintiffs' position. Moreover, ExxonMobil has consistently made clear its intent to file a petition for certiorari in both its motion for stay filed with the Supreme Court of Louisiana and most recently the Supreme Court of the United States, and has never said anything to the contrary.

We request you reconsider your position. If you do not agree by 12:00 noon Central Time on May 18th to accept payment and execute a Satisfaction of

Judgment by a date certain, ExxonMobil will pursue any and all rights and we place you on notice that this may include sanctions as well as an independent action for any damages that may result from Plaintiffs' position.

Sincerely,

ADAMS AND REESE LLP

/s/ Glen Pilié
Glen Pilié

GMP/rye

Enclosure

cc: Ralph R. Alexis, III, Esq. – via fax
Arthur Murray, Esq. – via fax

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[Names And Addresses Omitted In Printing]

May 18, 2006

Via Fax 504-566-0210
Glen Pilie
Adams & Reese
4500 One Shell Square
New Orleans, LA 70139

Re: ***Grefer v. Alpha Technical, et al.***
CDC Case No. 97-15004, Judge Gill-Jefferson – Division "A", Section 9
Our File No. 200147

Dear Glen:

I write in response to your letter of May 17 and to confirm our telephone conversation today. As I explained, our clients are interested in a final resolution of this case. We are agreeable to meeting Exxon's conditions for the tender and will forego our writ application if Exxon is prepared to likewise forego its writ application. We have concerns that the tender being offered by Exxon comes with certain conditions, including indemnification from liens and a satisfaction of judgment that specifically reserves Exxon's

right to continue with the appeal. Exxon has granted us until Monday at 12:00 p.m. to let you know whether we will accept Exxon's conditional tender in exchange for abandonment of our judgment debtor rule.

You further informed me that Exxon is considering whether to deposit the funds into the registry of the Court. Our legal research has revealed that no procedure exists in Louisiana law for such a deposit. Furthermore, a deposit into the registry of the court does not constitute an unconditional tender, which is necessary to cease judicial interest. For your reference I enclose the case entitled *American Motor Insurance Co. v. American Rent-All, Inc.*, 617 So.2d 944 (1993). In light of this, we ask Exxon to consider agreeing to a full and final dismissal, whereupon we will accept Exxon's conditional tender. Due to the Monday deadline for us to respond, I ask that Exxon please let us know whether this is agreeable by 12:00 p.m. tomorrow. I remain,

Very truly yours,
SMITH STAG, LLC

/s/ MGS
Michael G. Stag

MGS/jr
cc: Stuart Smith *(via mail)*
Andrew Sacks *(via fax)*
Steven Murray, Sr. *(via fax)*
Ralph Alexis *(via fax)*

ADAMS AND REESE LLP

[Names And Addresses Omitted In Printing]

May 18, 2006

Via Facsimile No. (504) 593-9601
Michael G. Stag, Esq.
Smith Stag, LLC
365 Canal Street – Suite 2850
New Orleans, LA 70130

Re: *Joseph Grefer, Camille Grefer, Rose Marie Grefer Hassi, and Henry Grefer v. Alpha Technical, et al.*
CDC No. 97-15004, Division "A", Section 5
Our File No. 249-37

Dear Mike:

In order to ensure there is no confusion it this matter, let me state ExxonMobil's position clearly. ExxonMobil intends to make full payment of the judgment now and to timely seek review with the United States Supreme Court.

ExxonMobil hereby makes an unconditional tender of full payment of the punitive damage component of the judgment and all legal interest thereon as of May 24, 2006, the date on which the funds will be wired to you. According to our calculations, the amount to be paid on May 24, 2006, totals $144,869,522.19. In order to make the payment, ExxonMobil needs you to provide in writing on your letterhead, no later than noon, Monday, May 22, 2006, the following: (a) wire instructions, (b) your

firm's tax ID, and (c) your confirmation of the full amount to be paid.

ExxonMobil would prefer that the Grefers and their attorneys execute a satisfaction of judgment and another indemnity agreement regarding potential attorneys' fees liens (as you did without question with respect to last month's payment of the actual damages component of the judgment). However, we are agreeable to dropping that request if it serves as a stumbling block to ExxonMobil's final payment on the judgment.

We ask that you provide the letter with the information requested above so that we may promptly pay the judgment.

In light of this unconditional tender, we put you on notice that any action taken by the Grefers to otherwise enforce the judgment shall be considered an abuse of process for with ExxonMobil will seek appropriate sanctions and damages.

Sincerely,

ADAMS AND REESE LLP

/s/ Glen Pilié
Glen M. Pilié

GMP/rye

cc: Ralph R. Alexis, III, Esq., – via fax
Arthur Murray, Esq. – via fax

MURRAY LAW FIRM
SUITE 2550 LL&E TOWER
909 POYDRAS STREET
NEW ORLEANS, LOUISIANA 70112-1000

May 22, 2006

[Names And Addresses Omitted In Printing]

Via Regular Mail, E-Mail and Facsimile
Glen M. Pilie
Adams and Reese
701 Poydras Street, Suite 4500
New Orleans, LA 70139

RE: Grefer v. Alpha

Dear Glen,

We acknowledge receipt of yours of May 18, 2006 offering to "unconditionally" pay the punitive damage judgment plus interest to a date certain. We must respectfully reject your tender. Our refusal is not arbitrary. First, your tender is *not* unconditional under Louisiana law. *See, e.g., LaGraize v. Bickham,* 391 So. 2d 1185, 1190-91 (La. App. 4th Cir. 1980); *Gagner v. Zummo,* 487 So. 2d 721 (5th Cir. 1986); and *Green v. Industrial Helicopters,* 560 So. 2d 684 (La. App. 3rd Cir. 1990). Second, receipt of the money by the Grefers conditioned on your further appeal subjects them to potential complicated income tax consequences. Third, receipt of the money, under such circumstances, *could* subject the Grefers to restitution to Exxon in the unlikely event that the United States Supreme Court grants Exxon's writ and, subsequently, reverses the judgment.

The Grefers make the following alternative proposal: If Exxon pays the entire judgment plus interest *and* foregoes its writ application to the Supreme Court, the Grefers will forego their writ application. As we only have a short time to file our respective writs, the Grefers ask that Exxon either accept or reject this settlement offer by Friday, May 26 at noon. *The Grefers hereby give Exxon assurance that no action will be taken adverse to its interests during that time.*

Our proposal is based on the following: When the United States Supreme Court denied Exxon's renewed application, a very clear message was sent with respect to the outstanding judgment. Specifically, after *every* Justice was given the opportunity to consider the matter, the Court indicated that it does *not* believe there is a "reasonable probability" that four Justices will grant certiorari *nor* a "significant possibility" that a majority of the Court will reverse the decision below. Indeed, both the Louisiana Supreme Court and the United States Supreme Court reached that conclusion, all told, on three separate occasions. In short, we now know that Exxon has virtually no chance of overturning or reducing the current judgment.

The Grefers, on the other hand, have not yet received such a clear message from the Court with respect to the writ application they intend to file. In their appeal, the Grefers raised an important constitutional issue before the Louisiana Supreme Court, one that they believe would merit the Supreme

Court's review. Unlike the issues already presented to the Court by Exxon (and found to be unworthy of a stay), the Grefers' issue is one that the Court has not yet considered and one that relates to an overriding policy concern, rather than a particularized concern about the propriety of the judgment in this case. While the Grefers' argument can be found in their writ application to the Louisiana Supreme Court, the following is a brief summary:

Despite the fact that *Cooper v. Leatherman* allows a *de novo* review of the constitutionality of punitive awards, the right to a jury trial on the amount of punitive damages remains inviolate. *Todd v. Roadway Express, Inc.*, 178 F. Supp. 2d 1244 (M.D. Ala. 2001). To keep juries in the decision making process and to protect the right to a jury trial, deference must be given to the jury's punitive award. By reducing the jury's punitive award to an amount it determined to be appropriate, rather than the highest amount constitutionally permissible, the Fourth Circuit failed to give the jury's award any deference, effectively taking the jury out of the process. *Johansen v. Combustion Engineering, Inc.*, 170 F.3d at 1320 (7th Cir. 1999); *Sherman v. Kasotakis*, 314 F. Supp. 2d 843, 867-68 (N.D. Iowa 2004); *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1048-51(8th Cir. 2002); *Filipovich v. K & R Express Sys. Inc.*, 2003 WL 1463531 at *14-15 (N.D. Ill. Mar. 21, 2003), *rev'd in part on other grounds* 391 F.3d 859 (7th Cir. 2004).

The Grefers are confident that the Court will seize the opportunity to consider the very important issue raised in *Johansen, Ross, Todd,* and *Sherman.* In light of the *Cooper* decision, does a reviewing court have to give deference to a jury's punitive award when it makes a due process reduction? Of course, it bears noting that the Court often accepts individual writ applications or specific issues within writ applications while denying the remaining applications/ issues. The Grefers are, therefore, confident that seeking their writ application and having it granted will not necessarily lead to Exxon's writ application (one the Court has indicated lacks merit) being granted. In other words, if both sides pursue their writ applications, there is a *very real risk* for Exxon that the *only* issue the Court will consider is whether the Fourth Circuit did not give enough deference to the jury when it reduced the punitive award.

If the Court decides that issue in favor of the Grefers, it will then have to decide what the highest constitutionally permissible amount is in this case. The *Boeken* case, in which writs were recently denied by the United States Supreme Court, is instructive. *See Boeken v. Philip Morris, Inc.,* 26 Cal. Rptr. 3rd 638 (Cal. App. 2nd Dist. 2005), cert denied, 126 S.Ct. 1567 (2006). *Boeken* involved a 9:1 ratio between punitive damages ($50,000,000) and compensatory damages (approximately $5,500,000). *Id.* It is similar to this case in many relevant respects. It involved a multi-million dollar punitive award which had been reduced by the state appellate court to comport with

due process requirements. It also involved comparable misconduct and significant actual and potential harm. The Supreme Court's refusal to grant certiorari in *Boeken* suggests that a 9:1 ratio between punitive damages and compensatory damages in a case such as this one would not be constitutionally excessive. *See id.*; *see also TXO,* 509 U.S. 443 (ratio of 526:1); *Mosing,* 830 So. 2d 967 (ratio of 9:1). It is, therefore, conceivable that the Grefers' proposed writ application could result in a significant increase in the judgment (potentially as high as nine times the compensatory award – over $500,000,000).

To sum up, the risk to Exxon should it further pursue its appeal outweighs any benefit that could reasonably be obtained thereby. A realistic best case scenario for Exxon is that it convinces the Court, despite its stay denial, to grant writs and reduce the punitive damage award to a 1:1 ratio ($56,145,000 plus interest of more than $19,000,000). Conversely, as was discussed above, the Grefers could increase the award to *$505,305,000 plus interest of more than $171,000,000.* There is, of course, the very strong possibility that the Supreme Court will deny both writ applications (after $24,611.51 in interest has accrued on the punitive award *each day* the parties await that decision). These risks to Exxon clearly outweigh the potential gains. This is especially true when one considers the fact that it does not appear certain under Louisiana law that Exxon can fully tender the amount of judgment after it becomes final and executable *and* still maintain its right to further

appeal. There is simply no justification for Exxon to take such a significant gamble with its shareholders' money (i.e. risk more than $676,000,000 in the hope against hope that it will only have to pay $75,000,000).

The final resolution proposed by the Grefers is in the best interest of *both sides* to this dispute, and it should be given serious consideration. Accordingly, pursuant to the Sarbanes-Oxley Act of 2002, plaintiffs request that you promptly forward the foregoing settlement offer to your client's Executive Committee and Board of Directors for their review. This letter has been written for settlement purposes only and is not to be considered an admission against interest. The Grefers hope and trust an amicable resolution can be reached in this case.

Looking forward to hearing from you, I remain

Very truly yours,

/s/ Stephen Murray
STEPHEN B. MURRAY

Cc: Arthur Murray
Mike Stag
Stuart Smith
Ralph Alexis
Andrew Sachs
John Weston
Jack Harang

ADAMS AND REESE LLP

[Names And Addresses Omitted In Printing]

May 22, 2006

Via Facsimile No. 504-584-5249
Stephen B. Murray
Murray Law Firm
Suite 2550, LL&E Tower
909 Poydras Street
New Orleans, LA 70112-4000

Re: *Joseph Grefer v. Alpha Technical, et al.*
Our File No. 249-37

Dear Stephen:

This will acknowledge receipt of your correspondence dated May 22, 2006, rejecting ExxonMobil's offer of May 18, 2006, to unconditionally pay the punitive damage judgment plus interest as of May 24, 2006. This constitutes the second time, since the United States Supreme Court denied ExxonMobil's request for stay on May 15, 2006, that the Grefers have refused to accept ExxonMobil's tender to pay in full the punitive damage judgment.

As we discussed in our phone conversation today, ExxonMobil was preparing to file certain pleadings to protect its interests in the event the Grefers rejected ExxonMobil's second offer to pay the punitive damage portion of the judgment. The purpose of the pleadings ExxonMobil planned to file today upon rejection of its tender offer is to prevent the Grefers from moving forward with the judgment debtor rule filed on their

behalf and presently scheduled to be heard on June 2, 2006. It is ExxonMobil's position that those proceedings are totally unnecessary and unwarranted, given ExxonMobil's offer on two occasions now to fully pay the punitive damage judgment plus interest.

From our phone conversation today, I understand you will consult with the Grefers and recommend that the judgment debtor rule currently pending for June 2, 2006, be continued without date. I respectfully ask that you notify me by noon tomorrow, May 23, 2006, whether the Grefers have agreed and in fact will continue the judgment debtor rule without date. If you cannot give me that assurance by noon tomorrow, I have no choice but to move forward with the filing of pleadings to protect the interests of ExxonMobil from what it considers to be unwarranted judicial process.

I look forward to your response and our continuing dialogue.

Very truly yours,

ADAMS AND REESE LLP

/s/ Glen Pilié
Glen M. Pilié

GMP/rye

cc Arthur Murray, Esq.
Michael Stag, Esq.
Stuart Smith, Esq.
Ralph Alexis, Esq.

ADAMS AND REESE LLP

[Names And Addresses Omitted In Printing]

May 25, 2006

Via Facsimile No. 504-584-5249
Stephen B. Murray
Murray Law Firm
Suite 2550, LL&E Tower
909 Poydras Street
New Orleans, LA 70112-4000

Re: *Joseph Grefer v. Alpha Technical, et al.*
Our File No. 249-37

Dear Stephen:

Thank you for following up on our phone conversation of May 22, 2006 and continuing the judgment debtor rule without date. ExxonMobil has carefully considered your legal analysis and your proposal set forth in your correspondence of May 22, 2006. However, ExxonMobil at this time cannot agree to forego seeking further review with the United States Supreme Court. ExxonMobil fully appreciates the legal analysis you provided in your letter and understands that the Grefers also have the ability to seek further review.

As we discussed, ExxonMobil also renews its position and stands ready to completely satisfy the punitive damage portion of the award by wiring the appropriate funds on a date certain to an account designated by the Grefers. In order to make that transfer, ExxonMobil needs written instructions on

your letterhead confirming the amount owed including interest as of a certain date, instructions for wire transfer, and your tax ID number.

I understand that the Grefers are consulting with tax counsel and as a result may have an alternative method they wish to propose for funding the judgment on an interim base while further judicial review is sought by the parties. ExxonMobil is willing to consider any proposal you wish to send.

With kind regards, I remain

Very truly yours,

ADAMS AND REESE LLP

/s/ Glen Pilié
Glen M. Pilié

GMP/rye

cc Arthur Murray, Esq.
Michael Stag, Esq.
Stuart Smith, Esq.
Ralph Alexis, Esq.
Martin A. Stern, Esq.

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[Names And Addresses Omitted In Printing]

June 16, 2006

Glen Pilie, Esquire
Adams & Reese
4500 One Shell Square
New Orleans, LA 70139

Via Fax 504-566-0210

Re: Grefer v. Alpha Technical, et al.
CDC Case No. 97-15004, Div. "A"
Our File No. 200147

Dear Glen:

This is to confirm our conversation that the Grefer plaintiffs have accepted ExxonMobil's unconditional offer to pay and satisfy the punitive damage award in the case. As such, we request that you wire ONE HUNDRED FORTY-FIVE MILLION FIVE HUNDRED FIFTY-EIGHT THOUSAND SIX HUNDRED FORTY-FOUR AND 38/00 ($145,558,644.38) DOLLARS by the close of business Wednesday, June 21st, 2006 to:

Bank of America Investment Services, Inc.
ABA: xxx-xx-xxx
Beneficiary bank: Chase Manhattan Bank,
New York, NY
For the account at: NFS, Account # xxx-xxx-xxx

For the benefit of Smith Stag, LLC (Grefer Escrow o/b/o Joseph Grefer, Camille Grefer, Rose Marie Grefer Hasse, Henry Grefer, Stuart H. Smith, Michael G. Stag, Andrew B. Sacks, Jack W. Harang, Ron A. Austin, Stephen Murray, Sr., Arthur M. Murray, Porteous, Hainkel & Johnson, LLP, Roger A. Stetter, and Barry J. Cooper, Jr.)

Client Account Number: xxx-xxxxxx

Sincerely,
SMITH STAG, LLC

/s/ Stuart Smith
Stuart H. Smith

SHS/gtm
cc: Andrew B. Sacks
Michael G. Stag

ADAMS AND REESE LLP

[Names And Addresses Omitted In Printing]

June 20, 2006

Via Facsimile No. (504) 593-9601
and United States Mail
Stuart H. Smith, Esq.
Smith Stag, LLC
365 Canal Street – Suite 2850
New Orleans, LA 70130

Re: *Joseph Grefer, Camille Grefer, Rose Marie Grefer Hassi, and Henry Grefer v. Alpha Technical, et al.*
CDC No. 97-15004, Division "A", Section 5
Our File No. 249-37

Dear Stuart:

This will acknowledge receipt on Friday, June 16, 2006, of your written confirmation on behalf of the Grefers of the total amount of $145,558,644.38 to be transferred by wire on Wednesday, June 21, 2006, to the Grefers by ExxonMobil. Upon transfer of these funds ExxonMobil will have completely satisfied the punitive award in this case, including judicial interest thereon since the date of judgment. Upon confirmation of successful wire transfer this Wednesday, I ask that you have the Grefers and you as their counsel sign this letter in the space provided below indicating receipt of the funds and acknowledging that the punitive damage award has been completely

satisfied by ExxonMobil, thereby allowing release of the appeal bond posted in this matter by ExxonMobil.

Very truly yours,

ADAMS AND REESE LLP

/s/ Glen M. Pilié/rye
Glen M. Pilié

GMP/rye

RECEIPT OF AND ACKNOWLEDGED ON THIS
21ST DAY OF JUNE, 2006 BY:

_____
Joseph Grefer

_____
Stuart H. Smith, Esq.
Counsel for Plaintiffs, Joseph Grefer, Camille Grefer, Rose Marie Grefer Hassi, and Henry Grefer

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June 22, 2006

Glen Pilie, Esquire
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Via Fax 504-566-0210

Re: Grefer v. Alpha Technical, et al.
CDC Case No. 97-15004, Div. "A"
Our File No. 200147

Dear Glen:

This will confirm that we have received verbal confirmation that Exxon's unconditional tender to Plaintiffs in satisfaction of the Grefer punitive damage judgment has been received today. We are waiting for written confirmation of the receipt of those funds. Upon written confirmation, this unconditional tender will satisfy the punitive damage award with interest in the Grefer litigation. However, we are waiting for written confirmation as to why the $147 million plus dollar wire was delayed by one day. Obviously, this

would necessitate an additional interest payment by Exxon if it was Exxon's fault.

Sincerely,
SMITH STAG, LLC

/s/ Stuart H. Smith
Stuart H. Smith

SHS/gtm
cc: Andrew B. Sacks (via fax # 215-925-0508)
Michael G. Stag

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June 28, 2006

Glen Pilie, Esquire
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4500 One Shell Square
New Orleans, LA 70139

Via Fax 504-566-0210

Re: Grefer v. Alpha Technical, et al.
CDC Case No. 97-15004, Div. "A"
Our File No. 200147

Dear Glen:

This will confirm that Plaintiffs are in receipt of ExxonMobil's unconditional tender of ONE HUNDRED FORTY-FIVE MILLION FIVE HUNDRED FIFTY-EIGHT THOUSAND SIX HUNDRED FORTY-FOUR AND 38/00 ($145,558,644.38) DOLLARS in satisfaction of the punitive award in the Grefer case.

Sincerely,

SMITH STAG, LLC

/s/ Stuart H. Smith
Stuart H. Smith

SHS/gtm

cc: Andrew B. Sacks (via fax # 215-925-0508)
Michael G. Stag

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No. 07-1055

IN THE
Supreme Court of the United States

EXXON MOBIL CORPORATION,
Petitioner,

v.

JOSEPH GREFER ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The jury awarded $1 billion in punitive damages after being instructed that the only prerequisite for punishment was that ExxonMobil "w[as] wanton or reckless in [its] disregard for public safety." App. 10a. The Louisiana Court of Appeal affirmed that instruction and held ExxonMobil liable for $112 million in punitive damages where the only reprehensible conduct it identified was ExxonMobil's alleged mistreatment of nonparties. Plaintiffs cannot point to any decision of this Court that permits that result. Instead, they identify a series of procedural bars, most of which were rejected by the court below and none of which prevent this Court from reaching the merits. Plaintiffs' attempts to deflect attention from the enormous and unfounded punitive damages award cannot obscure that the Court of Appeal's refusal to follow *Philip Morris USA v. Williams,* 127 S. Ct. 1057 (2007), *petition for cert. filed,* (Mar. 24, 2008) (No. 07-1216), as well as the significant conflicts presented by its decision, warrant this Court's review.

ARGUMENT

I. THE COURT OF APPEAL REFUSED TO FOLLOW *WILLIAMS* AND PUNISHED EXXONMOBIL SOLELY FOR POTENTIAL HARM TO NONPARTIES.

On remand from this Court to reconsider in light of *Williams*, the court below affirmed a massive punitive damages award based *solely* on potential physical harm ExxonMobil might have caused nonparties in a case in which plaintiffs themselves al-

leged only economic injury. That refusal to follow *Williams* warrants summary reversal.

1. There is no merit to plaintiffs' claims that ExxonMobil's appeal became moot when it paid the punitive damages award or that ExxonMobil waived its objection to punishment for nonparty harm because it failed to request a "*Williams* instruction." BIO 17.[1] Plaintiffs made those arguments to the court below, which necessarily rejected them by deciding the "ultimate[]" question "whether Exxon received a fair trial" under *Williams*. App. 13a.

Contrary to plaintiffs' reliance on state law in this Court (BIO 15), the question whether a case becomes moot upon satisfaction of an underlying judgment is one of federal constitutional law. *See De Funis v. Odegaard*, 416 U.S. 312, 316 (1974) ("[E]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve.") (internal quotation marks omitted). This Court has long held that "[t]here can be no question that a debtor against whom a judgment for money is

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[1] ExxonMobil was not, as plaintiffs contend (BIO 13), "anxious" to pay the punitive damages judgment. It did so only after plaintiffs demanded payment, threatened to execute on the judgment, and filed a judgment debtor rule, ExxonMobil Petition-Stage Reply Br. 1-2, *Grefer v. Alpha Technical*, No. 2002-CA-1237 (La. Oct. 1, 2007), and after both this Court and the Louisiana Supreme Court denied applications for a stay. BIO 8-9. Although ExxonMobil offered "to unconditionally pay" the judgment, it explicitly maintained its right to seek review. BIO App 15a-17a; *see, e.g.*, *Koerner & Lambert, A Prof'l Law Corp. v. Allstate Ins. Co.*, 363 So.2d 546, 547 (La. Ct. App. 1978) (plaintiffs failed to prove acquiescence in judgment where, prior to defendant's payment under threat of execution, defense counsel told plaintiffs he recommended appeal).

recovered, may pay that judgment, and bring a writ of error to reverse it, and if reversed can recover back his money." *Dakota County v. Glidden*, 113 U.S. 222, 224 (1885); *accord Cahill v. N.Y., N.H. & H. R. Co.*, 351 U.S. 183, 183-184 (1956) (per curiam); *see* BIO App. 9a (plaintiffs' letter recognizing possibility of restitution if judgment below reversed).[2] Any other rule would inundate the Court with stay applications for money judgments and contravene the general "rule that issuance of a court's mandate or obedience to its judgment does not bar timely appellate review." *Graddick v. Newman*, 453 U.S. 928, 945 n.* (1981) (opinion of Rehnquist, J.).

Plaintiffs' additional assertion that ExxonMobil cannot object to punishment for nonparty harm because "the trial court's instructions tracked almost verbatim" those it proposed (BIO 17 (quoting App. 13a)) only demonstrates their misunderstanding of this Court's precedents. ExxonMobil requested the jury be instructed that it "[could] only award" punitive damages if, among other things, ExxonMobil had caused "the *plaintiffs*' damages ... by ... wanton and reckless conduct." App. 8a (emphasis added). The trial court instead instructed the jury that the sole predicate required for punitive damages was that "defendants were wanton or reckless in their disregard for *public* safety." App. 10a (emphasis added).[3]

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[2] The GVR Order in this very case was issued *after* the punitive judgment was paid. *See* BIO App. 25a; App. 122a.

[3] Although plaintiffs contend (BIO 18-19) that ExxonMobil did not object to the court's instructions, there is no way to determine that because the court lost the transcript of the charge

Even if plaintiffs were otherwise correct about the reasons why the Court of Appeal *might* have found (but did not find) ExxonMobil's claims procedurally barred under state law (BIO 14, 18-19), that would have no impact on this Court's jurisdiction, which extends to each federal claim pressed or passed upon below. *See Orr v. Orr*, 440 U.S. 268, 274-75 (1979); Eugene Gressman et al., *Supreme Court Practice* 203 (9th ed. 2007). Because, as plaintiffs themselves acknowledge (BIO 25), "the [Court of Appeal] analyzed the *Williams* due process issue on its merits," that issue is properly before this Court.

2. At last reaching the merits, plaintiffs claim (BIO 20) the focus on nonparty harm was justified because *Williams* "permits consideration of harm to third parties in assessing ... reprehensibility." Plaintiffs argue (BIO 21-23) that evidence of recklessness toward ITCO was relevant to the reprehensibility of ExxonMobil's conduct toward plaintiffs because it showed a general disregard for public safety.

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conference. App. 67a. As explained *infra* pages 5-7, moreover, regardless whether ExxonMobil objected to the instructions, the court erred even in *admitting* evidence of ExxonMobil's conduct toward nonparties. That evidence was in no way relevant to the reprehensibility of ExxonMobil's actions toward plaintiffs, who suffered only economic injury. Plaintiffs also wrongly claim (BIO 19-20 n.20) that ExxonMobil did not object to that evidence on due process grounds. In fact, ExxonMobil repeatedly objected to evidence "about ... issues other than connected to the remediation of [plaintiffs'] property" and moved for a mistrial on the ground that plaintiffs had turned the trial into a "health-effect case" that they lacked "standing to bring" for "third parties ... allegedly injured by this alleged toxic waste." Trial Tr. 114, 120, *Grefer v. Alpha Technical*, No. 97-15004 (Civ. Dist. Ct. Parish of Orleans, La. Apr. 20, 2001).

But plaintiffs' evidence of alleged health risks to ITCO employees in fact invited the jury to punish for *that* potential harm, not for their property damage. And plaintiffs *continue* to rely on health risks to nonparties to justify punitive damages in their opposition.[4]

In any event, plaintiffs' argument proves too much. If recklessness toward third parties could suffice to establish reprehensibility as to a plaintiff, then risks or harm to nonparties would always justify punitive damages. This Court has squarely rejected that contention: "[The] potential harm [to be considered] [i]s harm potentially caused *the plaintiff*." *Williams*, 127 S. Ct. at 1063; *see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (defendant should not be punished "for being an unsavory individual or business"). The *only* conduct the court below found reprehensible was ExxonMobil's conduct toward nonparties. But that is insufficient to support an award of punitive damages where there has been no reprehensible conduct as to plaintiffs themselves.[5] Additionally, allowing

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[4] *E.g.*, BIO 2 (contractors "generated radioactive dust clouds"), 4 (ExxonMobil failed to notify contractors of "health and safety hazard"). In fact, the uncontroverted evidence at trial was that 99.2% of plaintiffs' property was within the limits set by the Louisiana Department of Environmental Quality (LDEQ) for unrestricted use. App. 67a.

[5] Plaintiffs cite two statements to contend the court below found ExxonMobil's conduct reprehensible vis-à-vis plaintiffs. BIO 23 n.24. They show the contrary. First, the court deemed it reprehensible not that ExxonMobil "'took no step to remove the radioactive material' from the Grefer tract," BIO 23 n.24 (quoting App. 96a), but that ExxonMobil "took no step to remove the radioactive material from *ITCO's* premises." App.

plaintiffs to seek damages for potential third-party harm could well lead to the duplicative punishment against which this Court guarded in *State Farm*, 538 U.S. at 423. Pet. 15 (discussing third-party litigation).

Although plaintiffs insist (BIO 24-25) that nothing in *Williams* requires their harm to resemble the potential harm upon which the finding of reprehensibility was based, they are mistaken.[6] The heart of *Williams*' holding is that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense," 127 S. Ct. at 1063 (internal quotation marks omitted) – and a defendant has no way effectively to defend against dissimilar injuries to nonparties when "charged" only with injury to plaintiffs.

Plaintiffs' argument (BIO 7, 23-24, 38) that both the punitive and compensatory damages below were properly based on plaintiffs' "potential[] liab[ility] to third parties under Louisiana law" is again mistaken. "Potential liability" was not the reason the

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96a (emphasis added). Second, the court did not find it reprehensible that plaintiffs were left to remediate the property after ITCO. *See* BIO 23 n.24. Rather, the court suggested it reprehensible that ExxonMobil put ITCO out of business by sending contaminated equipment elsewhere, thus awarding punitive damages because ExxonMobil *stopped* any contamination of plaintiffs' land. App. 23a-24a.

[6] While *Williams* indicates that, in appropriate cases, plaintiffs can introduce evidence that conduct toward plaintiffs endangered the public, it nowhere suggests that the harm posed to the public may differ from the harm plaintiffs experienced. *See* 127 S. Ct. at 1064.

appellate court upheld the awards. *See* App. 117a-118a (Tobias, J., concurring in denial of rehearing). And there is no record evidence establishing the nature and extent of plaintiffs' newly-claimed litigation liability. Upholding punitive damages based on such belated, unsupported, and speculative assertions of potential liability would vitiate *Williams* and *State Farm*, denying defendants the opportunity fully to defend themselves. *Williams*, 127 S. Ct. at 1063.

It would also allow plaintiffs to recover duplicative awards in cases where future litigation is likely. Indeed, even as plaintiffs in this case argue their compensatory and punitive damages awards are necessary to cover potential damages from future litigation (BIO 7, 38), they have already named *ExxonMobil* as a cross-claim defendant in third-party litigation and have "specifically ple[d]" ExxonMobil's "fault ... as a bar, set off or reduction to any fault attributed to them or damages awarded against them." Grefer Answer & Cross-Claim 6, 9, *Warner v. ExxonMobil Corp., et al.*, No. 02-19657 (Civ. Dist. Ct., Parish of Orleans, La. Aug. 18, 2005). Plaintiffs' reliance on future litigation thus exposes their suit for what it is: an attempt to obtain punitive damages for potential harm that has not been (and may never be) inflicted upon them.

II. THIS CASE PRESENTS AN UNRESOLVED CONFLICT REGARDING HOW TO REMEDY IMPROPER CONSIDERATION OF NONPARTY HARM.

The jury's award in this case was, by the Court of Appeal's own reckoning (App. 27a), tainted by consideration of improper evidence, and that taint was

not remedied by reduction of the award. As ExxonMobil has explained (Pet. 24), due process constrains both the amount of a punitive damages award and the procedure used to impose it. *Williams*, 127 S. Ct. at 1062. Those different limitations require different remedies: Although a court can cure an excessive award by reducing it, a new trial is necessary to correct a procedurally-deficient award when there is no way to determine what part of the award has been tainted by the violation. Plaintiffs do not address this important distinction.

1. Plaintiffs nonetheless argue (BIO 28) that *Williams* allows lower courts to choose among remedies. In quoting *Williams*, however, plaintiffs omit the text that "remand[s] the case" to the Oregon Supreme Court. 127 S. Ct. at 1065. This Court did not give lower courts unfettered discretion to remedy procedural due process violations however they see fit, and it certainly did not hold that a *Williams* violation could be remedied by reducing the damages awarded. It simply asked *the Oregon* court to consider the question.

2. Plaintiffs next argue (BIO 30) that there is no split in authority because no court has "held that retrial [i]s required whenever a jury [is] not ... provided with *Williams* guidelines." Plaintiffs ignore that the split in authority presented by this case is not whether appellate reduction can *ever* properly remedy a procedural due process violation, but "whether such a reduction is a permissible remedy *when the reviewing court cannot determine what portion of the award has been tainted* by improper considerations." Pet. 11 (emphasis added). As Exxon-

Mobil has explained (Pet. 20-23), there is a deep, long-standing split over that question.

Plaintiffs' suggestion (BIO 31-32) that the split is not worth resolving because cases cited in the petition pre-date *Williams* is unpersuasive. This Court recognized that the split over remedy merited its attention as early as *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), although it did not reach the question there. Pet. 19 & n.8. *Williams* likewise failed to resolve the issue, and the split continues to widen. *Compare White v. Ford Motor Co.*, 500 F.3d 963, 972-73 (9th Cir. 2007) (new trial "the proper remedy" where jury "may have" relied on nonparty harm; remittitur "not designed to compensate for excessive verdicts in cases where jury is improperly instructed"), *and Buell-Wilson v. Ford Motor Co.*, --- Cal. Rptr. 3d ---, 2008 WL 625016, at *52-53 (Ct. App. Mar. 10, 2008) (no need for new trial after alleged procedural violation where court "reduced the award to comport ... with due process principles" and "[defendant]'s conduct justified ... a two-to-one ratio").

Plaintiffs' suggestion (BIO 32-33) that Louisiana law provides adequate remedy for improper consideration of risks to nonparties is likewise misguided. The Court of Appeal did not engage in the kind of fact-finding plaintiffs suggest. Rather, the court relied solely on risks to ITCO to award punitive damages to plaintiffs who did not face the same potential harm. And it attempted to correct the reliance upon nonparty harm that it did recognize by simply reducing the award to what it believed the constitutional maximum available. App. 22a-24a, 27a-28a. There

is thus no state-law bar to the Court's resolution of the question presented.

III. THERE IS SIGNIFICANT DISAGREEMENT OVER THE CONSTITUTIONAL MAXIMUM IN CASES OF SUBSTANTIAL COMPENSATORY DAMAGES.

The $112 million of punitive damages awarded below is excessive by any measure. Plaintiffs received an undeniably "substantial" $56 million award of restoration costs, equal to 37 times their economic loss. They are not required, and indeed, have no need, to spend that award on restoration, given that the damages awarded far exceed anything necessary to remediate the land to standards that "fully protect[] human health and the environment" as a matter of law. *Amicus* Br. of LDEQ 7-8, *Grefer v. Alpha Technical*, No. 05-C-190 (La. June 23, 2005). Punitive damages in this case of solely economic injury clearly should not exceed the $56 million already awarded for a $1.5 million piece of land.

1. Again seeking to avoid the merits, plaintiffs suggest (BIO 34-35) the question of excessiveness is not properly before this Court because the amount of punitive damages was not "raise[d]" by ExxonMobil below and was "beyond the scope of this Court's remand." But that was not plaintiffs' position below, when they argued the court should *increase* the award. Pl. Br. on Remand 22, *Grefer v. Alpha Technical*, No. 2002-CA-1237 (La. Ct. App. May 7, 2007) (application of *State Farm* "demonstrates that this Court's reduction of the punitive award to 2:1 was excessive, and an increase ... is justified"). ExxonMobil has consistently challenged that award as ex-

cessive, both in its first petition in this Court, *ExxonMobil v. Grefer*, No. 05-1670 (third question presented), and in response to plaintiffs' claims on remand, *see* Reply Br. on Remand 12, *Grefer v. Alpha Technical*, No. 2002-CA-1237 (La. Ct. App. May 17, 2007) (any "suggest[ion] that the award should be increased reflects a disregard for the holdings of ... the Supreme Court"). Although the Court of Appeal did not rule on the scope of remand, it readopted its original calculation under *BMW*, *see* App. 21a, 32a, again placing its analysis (and ratio) properly before this Court. *See Orr*, 440 U.S. at 274-75.

2. On the merits, plaintiffs argue (BIO 35-36) *State Farm* does not require a 1:1 ratio of punitive damages to actual harm whenever compensatory damages are substantial. But *State Farm* requires that any punitive damages further, and not exceed, the "legitimate purpose" of punishment and deterrence. 538 U.S. at 417. Compensatory verdicts themselves may have a deterrent function, *id.* at 426, so punitive damages "should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence," *id.* at 419 (emphasis added). Plaintiffs have shown no reason why additional punishment is required on top of the enormous $56 million award for restoration costs. The only reason plaintiffs offer for further punishment and deterrence (BIO 38) is the risk of harm to nonparties. That cannot constitutionally be the only basis for the award.

Plaintiffs also err (BIO 36-38) in suggesting that the $56 million restoration award correctly measures

their harm. That award goes far beyond anything necessary to protect human health or the environment, *supra* page 10; *cf. State Farm*, 538 U.S. at 426 (suggesting punitive damages should not "duplicate[]" compensatory award), and plaintiffs' harm certainly cannot be determined (BIO 38) by reference to future litigation, *see supra* pages 6-7. Rather, given the substantial restoration damages that did far more than compensate, there is no reason to believe any additional award is necessary to punish or deter here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1, 2008